(15,228.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 490.

T. J. BRYAN, APPELLANT,

vs.

GEORGE T. BRASIUS, HENRY W. RYDER, JOHN W. JEFFRIES, JAMES McCARTHY, GEORGE LORING, AND JOHN BACON.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

INDEX.

	Original.	Print.
Transcript from district court	1	1
Complaint	1	1
Summons	2	2
Sheriff's return	3	2
Amendment to complaint	4	3
Answer	5	3
Demurrer to answer	15	9
Amended answer	18	11
Demurrer to amended answer	22	14
Order on demurrer	25	15
Order on demurrers	26	16
Judgment	27	16
Plaintiff's first bill of exceptions	28	17
Second bill of exceptions	29	17
Third bill of exceptions	30	18
Fourth bill of exceptions	31	18
Fifth bill of exceptions	32	18
Sixth bill of exceptions	33	19

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 2, 1894.

	Original.	Print.
Plaintiff's Seventh bill of exceptions	34	19
Eighth bill of exceptions	35	19
Ninth bill of exceptions	36	20
Motion for new trial	37	20
Order overruling motion for new trial, &c	42	23
Plaintiff's bill of exceptions	43	23
Motion for new trial	43	23
Judgment	47	26
Admission as to bill of exceptions	49	27
Statement of facts	50	27
Appeal bond	57	32
Assignment of errors	59	33
Clerk's certificate	62	35
Judgment	63	35
Statement of facts in the nature of special verdict	64	36
Opinion	66	37
Concurring opinion	71	40
Order allowing appeal, &c	72	41
Petition for appeal	73	41
Allowance of appeal	74	42
Affidavit of value	75	42
Citation (copy)	77	43
Bond on appeal	80	44
Assignment of errors	83	45
Prayer for reversal	86	47
Clerk's certificate	87	47

1 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

T. J. BRYAN
vs.
GEORGE T. BRASIUS, HENRY W. RYDER, JOHN W. JEFFRIES, JAMES MCCARTHY, GEORGE LORING, and JOHN BACON.

To the district court for Maricopa county:

T. J. Bryan, the plaintiff, complains of George T. Brasius, John W. Jeffries, James McCarthy, George Loring, and John Bacon, and alleges:

1st. That plaintiff and all of the defendants except defendant Brasius reside in Maricopa county, Arizona, and that defendant Brasius resides in Gallipolis, in the State of Ohio.

2nd. That on the 29th day of June, 1887, plaintiff was the owner in fee and entitled to the possession of and ever since that date has been and is now the owner in fee and entitled to the possession of the following-described land and premises, to wit:

160 acres situated in Maricopa county, Arizona, formerly known as the Shorthill ranch and now generally known as the Central place, and more particularly described as the northeast ¼, quarter, of section (5) five, township (1) one north, of range (3) three east, Gila and Salt River meridian.

3rd. That afterwards, to wit, on or about July 1st, 1887, defendants entered into said land and premises and dispossessed plaintiff of the same and now unlawfully withhold possession thereof from plaintiff.

Wherefore plaintiff prays judgment for possession of said land and premises, for costs of suit, and for general relief.

CAMERON H. KING,
GOODRICH, SMITH, STREET, GOODRICH,
Att'ys for Plaintiff.

2 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

T. J. BRYAN, Plaintiff,
vs.
GEORGE T. BRASIUS, HENRY W. RYDER, JOHN W. JEFFRIES, JAMES MCCARTHY, GEORGE LORING, and JOHN BACON, Defendants.

Action brought in the district court of the second judicial district of the Territory of Arizona in and for Maricopa county and the complaint filed in said Maricopa county, in the office of the clerk of said district court.

In the name of the Territory of Arizona.

To George T. Brasius, Henry W. Ryder, John W. Jeffries, James McCarthy, George Loring, and John Bacon, defendants, Greeting:

You are hereby summoned and required to appear in an action brought against you by the above-named plaintiff, T. J. Bryan, in the district court of the second judicial district of the Territory of Arizona in and for Maricopa county, and answer the complaint therein filed with the clerk of this said court, at Phœnix, in said county, within ten days after the service upon you of this summons if served in the said county, or if served out of this said county and within this said judicial district, then within twenty days thereafter, or in all other cases within thirty days thereafter, the times above mentioned being exclusive of the day of service, or judgment by default will be taken against you.

3 Given under my hand and the seal of the district court of the second judicial district of the Territory of Arizona in and for Maricopa county this 11th day of July, 1887.

Court Seal.

J. E. WALKER.
Clerk of said District Court.

OFFICE OF THE SHERIFF, COUNTY OF MARICOPA.

I hereby certify and return that I received this summons on the 11th day of July, A. D. 1887, and personally served the same on the 12th day of July, A. D. 1887, on Henry W. Ryder, John W. Jeffries, James McCarthy, and John Bacon, defendants herein, by delivering to each of said defendants personally, at the county of Maricopa, on the said 12th day of July, A. D. 1887, a true copy of this summons.

After diligent search and inquiry I have been unable to find the defendants Geo. T. Brasius and George E. Loring in this county.

A. J. HALBUT, *Sheriff*,
By H. C. ORME, *Deputy*.

Sept. 6th, 1887.

4 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

T. J. BRYAN *et al.*
vs.
GEO. T. BRASSIUS *et al.* } No. 761.

Now comes the plaintiff in the above-entitled action and, by leave of the court first had, amends his original complaint on file herein, and for amendment to said complaint alleges, in addition to what is stated in said original complaint, and says that he claims the premises described in his original complaint by deed through Vina Brown, formerly Vina Bryan; that said Vina Brown is and was the surviving widow of J. M. Bryan, deceased; that said J. M. Bryan died intestate on the 29th day of A-gust, 1883, without issue; that the property in controversy in this action was acquired by onerous title during the marriage of said Vina Bryan, now Vina Brown; that letters of administration on said J. M. Bryan's estate were granted to M. W. Kales on or about September 24th, 1883; that said estate was fully administered upon, and the administration closed and the administrator finally discharged from his trust December 6th, 1884.

W. STREET,
BEN. GOODRICH,
Att'ys for Pl'ffs.

5 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

THOMAS J. BRYAN, Plaintiff,
vs.
GEORGE T. BRASSIUS, HENRY W. RIDER, JOHN W. Jeffries, James McCarthy, George Loring, and John Bacon, Defendants. } No. 761.

Now come the defendants in the above-entitled action, and, answering the complaint of the plaintiff herein, the defendants allege that the pretended interest and title through and by which plaintiffs claim the land described in the complaint was acquired by said plaintiff while these defendants were in the peaceable and adverse possession of said land, of which said land or any part thereof plaintiff has never been in possession; and of this they pray judgment of the court that they go hence with their costs in this behalf expended.

For a second defense—

(1) Defendants allege that plaintiff ought not to have or maintain this action, because the defendants have had and have held peaceable and adverse possession of the lands described in the complaint and hereinabove described under title thereto for more than three years next before the commencement of this action.

(2) For another defense defendants allege that the pretended cause of action in said complaint set forth did not accrue at any time

within three years next before the commencement of this action, and that the said pretended cause of action is barred by the
6 provisions of sub. 4, sec. 14, act No. 100 of the 11th Legislative Assembly of Arizona; and of this they are ready to verify and pray judgment of the court that they go hence with their costs in this behalf expended.

For a third defense defendants allege that said plaintiff ought not to be allowed to allege that he is the owner in fee-simple or otherwise or has any interest in or to the lands described in said complaint through or by any conveyance from Vina Brown, because heretofore, to wit, on the 16th day of October, 1883, a judgment was duly and regularly made and given and entered in and by the district court of the second judicial district of the Territory of Arizona in and for the county of Maricopa in an action wherein one M. W. Kales was plaintiff and one M. W. Kales, administrator of the estate of one J. M. Bryan, deceased, the husband intestate of said Vina Brown, —, whereby it was ordered, adjudged, and decreed, among other things, that the said lands described in said complaint be sold at sheriff's sale to satisfy certain sums, and which were part of the debts of said Bryan, deceased, and that the parties to said action might become purchasers at said sale, and that, under and pursuant to said judgment, thereafter and on or about the 13th day of December, A. D. 1883, said lands were sold by the sheriff of Maricopa county, Territory of Arizona, under and by virtue of said judgment, and said lands were not nor was any part thereof ever redeemed from said sale, and said sheriff did thereafter and on or about the 16th day of June, A. D. 1884, in pursuance of his duty in that behalf, convey all the estate, right, title, and interest of the estate of said J. M. Bryan, deceased, to one J. T. Sims, who became the purchaser of said land under and pursuant to said sale; and defendants are informed and believe and so allege that plaintiff has no right, title, or interest of, in, or to said lands except such as he claims to have derived from said Vina Brown during the month of June, A. D. 1887, and that said Vina Brown has not and never had any right, title, estate, or interest of, in, or to said premises
7 or any part thereof, except as the surviving wife and heir-at-law of said J. M. Bryan, deceased; that said J. T. Sims purchased lands and entered into possession thereof some time in the month of January, A. D. 1884, and commenced to improve said tract of land and continued in possession and occupancy thereof and continued to improve the same from thence until some time on or about the 28th day of February, A. D. 1887, when said land, by reason of the improvements made upon it by said Sims, having increased in value, the said Sims and his wife, Hannah T. Sims, granted, bargained, sold, and conveyed said land, together with certain other lands, to the defendant, George T. Brasius, herein, for the sum of fifty-nine thousand dollars, and said defendant thereupon entered into possession of said land as the owner thereof and caused the same to be surveyed and subdivided into blocks, lots, streets, and alleys as and for town lots, and publicly advertised the same for sale and sold to divers and sundry persons nearly all the

lots in said tract of land before the commencement of this action, and among the persons who purchased lots in said tract were one Myra K. Olds and one George Tantau; that thereafter and on or about the 8th day of June, A. D. 1887, said Vina Bryan, plaintiff's grantor, known as Vina Brown, purchased said lot or lots which had previously been sold by said defendant Brasius unto said Myra K. Olds from the said Myra K. Olds, and thereafter and on or about the 13th day of June, A. D. 1887, the said Vina Brown, plaintiff's grantor, purchased said lot or lots which had been previously sold by said defendant Brasius to said George Tantau, and these defendants are informed, believe, and so aver that said Vina Brown, plaintiff's grantor, did pay for said lots so sold by said defendant to said Myra K. Olds and George Tantau the sum of eighteen hundred dollars, in lawful money of the United States; that said Vina Brown, plaintiff's grantor, well knew and had notice of the sale of said premises by said Sims and wife to said defendant Brasius and the entry of said defendant into possession thereof and of the surveying of said tract of land and the subdividing thereof into
8 blocks, lots, streets, and alleys, and of the advertising and offering of said lots for sale and the selling of said lots composing said tract of land, and made no objection thereto, but acquiesced therein.

For a fourth defense these defendants further say that plaintiff ought not to be allowed to maintain this action, because one Jonathan M. Bryan, on or about the 29th day of August, A. D. 1883, died intestate, and at the time of his death was the owner in fee-simple and seized and possessed of the tract of land described in said complaint, and thereafter and heretofore, to wit, some time in the month of September, A. D. 1883, one M. W. Kales was, at the request of one Vina Bryan, plaintiff's grantor, appointed administrator of the estate of said J. M. Bryan, deceased, by the probate court of Maricopa county, Arizona; that in due course of administration and at the proper time, to wit, on the 25th day of October, A. D. 1884, said administrator, M. W. Kales, exhibited to the said probate court (which had sole jurisdiction in the premises) a full, true, and complete and final account of all his actions as such administrator in connection with the administration of said estate; in which said final account was exhibited and set forth the action had and done by said administrator in relation to said estate and the property and affairs thereof; in which final account said administrator reported to said court, among other things, that said tract of land in said complaint described had been sold to pay a certain mortgage thereon and in effect that said estate had no further interest in said land; that the said Vina Bryan (who was and is the wife and heir-at-law of said deceased) and also plaintiff's grantor had full and legal notice of the presentation and filing of said account and of the time for the hearing, settlement, and approving thereof by said probate court, but that the said Vina Bryan then or thereafter made no objections to the said account or any part
thereof nor objected to its allowance, settlement, and approval,
9 and the said account as exhibited, filed, and rendered was

duly settled, approved, and allowed by said probate court by a decree and judgment of said court duly made and given by said court on the 5th day of November, A. D. 1884, and said final account of said administrator and said decree and judgment of said probate court are hereby refer-ed to and made part hereof, and that plaintiff herein has no estate, right, title, or intersst of, in, or to said premises or any part thereof except such title as he claims to have derived some time in the month of June, 1887, from said Vina Bryan (now Vina Brown), and who then and never had any right, title, or interest of, in, or to said land and premises except such as she claims to have inherited from said J. M. Bryan as his heir-at-law; that heretofore and upon the 24th day of September, 1883, at the request of said Vina Bryan (the widow of said J. M. Bryan, deceased), letters of administration were granted by the probate court of Maricopa county upon the estate of said J. M. Bryan, deceased, to M. W. Kales, who thereupon qualified and entered upon the duties of such administration; that within the time prescribed by law creditors of the said J. M. Bryan presented their claims according to law to said administrator, who approved the same, which said claims were approved and allowed by the judge of said probate court and filed in the office of the clerk of said court; that the claims allowed by the said administration and filed and allowed by the probate court as claims against the estate of said J. M. Bryan and entitled to payment out of the proceeds of said estate amounted to the sum of forty-two thousand two hundred and thirty-six $\frac{93}{100}$ dollars; that upon the presentation of the accounts of said administrator to the said probate court, it appearing that the proceeds derived from the said estate were insufficient to pay the general creditors of said estate in full, and that said proceeds were only sufficient to pay a *pro rata* of said claims, to wit, forty-six (46%) per cent. thereof, that the said probate court duly made a decree and order requiring said administrator to distribute the proceeds of said estate among said creditors at said ratio, which was so done, leaving said creditors unpaid in the sum of eleven thousand seven hundred and eighty $\frac{45}{100}$ dollars, which said indebtedness of said J. M. Bryan still remains unpaid.

For a fifth defense defendants further allege that said Vina Bryan well knew of the sale of said northeast quarter of section five, township one north, of range three east, of Gila and Salt River meridian under and by virtue of the judgment set forth in the complaint in this action, and of the purchase thereof by said J. T. Sims, and of his entry into possession thereof, to which she at no time made any objection, but acquiesced in the same; that she knew of the intended purchase of said lands by defendant Brasius, but she made no objection thereto or claimed any interest in said lands, but remained silent; that the defendant Brasius purchased said lands, together with certain other lands, for the sum of fifty-nine thousand dollars, from said J. T. Sims, which said Vina Bryan well knew, and she made no objection thereto nor made any claim to said land; that the defendant Brasius entered into the possession of said land under said sale, which said Vina Bryan well knew,

but that she made no objection thereto nor made any claim to said land, but remained silent and acquiesced thereto; that said J. T. Sims made valuable improvements upon said lands to the amount of upwards of three thousand dollars, which said Vina Bryan saw and knew; that she made no objection thereto, but remained silent and acquiesced therein; and defendants further allege and show to the court that Vina Bryan consented to, ratified, affirmed, and acquiesced in all the proceedings had and done either in the said probate court or the said district court by the said M. W. Kales, administrator, in relation to the administration of the affairs of the estate of said J. M. Bryan, deceased, the recovery of said judgment, the sale of said land and premises by said sheriff, and the execution of the deed conveying said land to said Sims by said sheriff.

11 For a sixth defense: And for a further and separate defense the defendants allege that heretofore, to wit, on or about the 13th day of June, 1884, one M. W. Kales was or pretended to be the owner of the certificate of sale issued by L. H. Orme, as sheriff of Maricopa county, of the tract of land described in the plaintiff's complaint as follows, to wit: The northeast quarter of section five, in township one north, range three east, of Gila and Salt River meridian, free from all incumbrances, as he then was in the actual possession thereof; that one J. T. Sims, believing such to be the fact, on that day agreed with him for the purchase thereof for the price of three thousand five hundred dollars, whereupon said M. W. Kales conveyed and assigned the said certificate to the said J. T. Sims by his deed and instrument in writing dated on the 13th day of June, 1884; that the sum of three thousand five hundred dollars was actually paid by said Sims to said Kales at the time of the date of said assignment; that thereafter, to wit, on or about the 26th day of June, A. D. 1884, said L. H. Orme, as sheriff of Maricopa county, pursuant to said certificate of sale and for and in consideration of the money bid by said Kales and paid by said Sims, did make, execute, and deliver unto said Sims his deed, whereby he did convey unto said Sims all the right, title, and interest of said J. M. Bryan at the date of the execution of a certain mortgage by said Bryan in his lifetime, to wit, the 23rd day of February, 1883, or which he or his estate acquired thereafter of, in, or to said premises or any part thereof; that said Sims thereupon entered into possession and occupancy of said premises and improved the same and expended large sums of money in improving said land and premises, and continued in the actual possession thereof until on or about the 28th day of February, A. D. 1887; that said Sims had not at or before the time of the said conveyance and assignment to him by said Kales and the execution of said deed to him by said sheriff or of the payment of the purchase-money any notice whatever, either express or implied, that the plaintiff in said suit or action referred to, in the complaint which was brought to foreclose said mortgage, was the same identical person who was named as the defendant in

12 said suit or action, or that the said M. W. Kales, the purchaser at the sheriff's sale of said *said* property, was the same identical person who was the administrator of the estate of J. M. Bryan, de-

ceased, or that there was any defect in the parties or proceedings in said action; and the defendants aver that thereafter and on the 28th day of February, A. D. 1887, said J. T. Sims, with his wife, Hannah T. Sims, were or pretended to be owners in fee-simple of the said northeast quarter of section five, in township one north, of range three east, of Gila and Salt River meridian, free from all incumbrances, and they were in the actual possession thereof; that defendant George T. Brasius, believing such to be the fact, on that day agreed with him for the purchase thereof, with certain other lands, in fee-simple, for the price of fifty-nine thousand dollars; whereupon the said J. T. Sims and his wife, Hannah T. Sims, conveyed the same premises to defendant Brasius by their deed dated on the 28th day of February, A. D. 1884; that the sum of fifty-nine thousand dollars was actually paid by defendant Brasius to said J. T. Sims at the time of the date of said deed; that these defendants had not at or before the time of the said conveyance or of the said payment of the purchase-money any notice whatever, either express or implied, that the plaintiff in the said suit or action referred to in the complaint, which was brought to foreclose said mortgage, was the same identical person who was named as the defendant in said suit or action, or that the said M. W. Gales, the purchaser at the sheriff's sale of said property, was the same identical person who was the administrator of the estate of J. M. Bryan, deceased, or that there was any defect in the parties or proceedings in said action.

For a seventh defense: And these defendants deny that on the 29th day of June, 1887, or at any other time whatever, plaintiff was the owner in fee or of any other estate or otherwise or entitled to the possession, or that plaintiff ever since said date or any other date or at any other time whatever has been or is now the owner
13 in fee or any other estate or otherwise entitled to the posses-ion of the lands and premises described in his complaint herein or either thereof or any part of the same, and deny that the defendants dispossessed plaintiff of said lands and premises or any part thereof, and deny that plaintiff ever was in possession of said lands or premises or any part thereof, or that defendants unlawfully withhold the same or any part thereof from plaintiff.

For an eighth defense: And for a further defense and by way of cross-complaint these defendants aver that they and others who are purchasers from defendant George T. Brasius are the owners, in possession of, and entitled to the possession of the lands described in said complaint, and for more than five years last past they and their grantors and predecessors in interest and others who are purchasers from defendant Brasius have been the owners, in the actual, open, notorious, exclusive, and adverse possession of said tract of land and every part thereof, and that said plaintiff claims and asserts an interest or interests therein adverse to these defendants, and particularly these allegations of his complaint herein, and that the claims an- assertions of plaintiff are without any right whatever; that said plaintiff has not any right, title, or interest whatever in said land and premises or any part thereof, and that said claim of plaintiff is a cloud upon defendants' title.

Wherefore defendants pray that said plaintiff may be required to set forth the nature of his claims, and that all adverse claims of said plaintiff may be determined by decree of this court, and that by said decree it be adjudged that these defendants and others who are purchasers from defendant Brasius are the owners and entitled to the possession and enjoyment of said premises, and that said plaintiff has no legal right, title, or interest whatever in or to said land and premises or any part thereof, and that said plaintiff be forever debarred from asserting any claim whatever in or to said land and
14 premises adverse to these defendants; that these defendants do have and recover their costs herein, and for such other, further, and different relief as may be agreable to equity and good conscience.

CLARK CHURCHILL.

TERRITORY OF ARIZONA, *County of Maricopa,* } ss:

Henry W. Ryder, being first duly sworn, says that he is one of the defendants in the above-entitled cause; that he has heard the foregoing answer read and knows the contents thereof; that the same is true of his own knowledge except as to the matters and things therein stated on information and belief, and as to those matters he believes it to be true.

HENRY W. RYDER.

Subscribed and sworn to before me this 21st day of October, A. D. 1887.

[NOTARIAL SEAL.] W. D. FULWILER, *Notary Public.*

15 In District Court, 2nd Judicial District of Arizona, in and for Maricopa County.

THOMAS J. BRYAN, Plaintiff,
vs.
GEORGE T. BRASIUS, HENRY W. RYDER, JOHN W. JEFFRIES, JAMES MCCARTHY, GEORGE LORING, and JOHN BACON, Defendants. } No. 761.

Now comes the plaintiff in the above numbered and entitled cause and demurs to defendants' first cause of defense, which alleges that plaintiff's title to the lands in controversy was acquired by him while defendants were in the peaceable and adverse possession thereof, and that plaintiff has never been in possession thereof, and for demurrer says that same is insufficient in law and does not state facts sufficient to constitute any defense to their action.

2nd.

Plaintiff demurs to the 2nd defense set forth in defendants' answer, setting up the statutes of limitation of three years, and for demurrer says that same is insufficient in law and does not state facts sufficient to constitute any defense to this action.

3rd.

Plaintiff demurs to the 3rd defense in defendants' answer, setting up as a defense to this suit the judgment and sale thereunder of the lands in controversy in the suit of M. W. Kales *vs.* M. W. Kales, administrator of the estate of J. M. Bryan, deceased; the con-
16 veyance of said lands by the sheriff, under said judgment and sale, to J. T. Simms; the conveyance by said Simms and wife to defendant Brasius; the survey and subdivision of the tract into lots, blocks, alleys, streets, &c.; the advertising and sale thereof to sundry persons; the sale of certain lots to Myra R. Oulds and George Tantau; the purchase of same from them by Vina Bryan, or Brown, of said lots, &c.; and for demurrer plaintiff says that same is insufficient in law and does not state facts sufficient to constitute a defense to this action.

4th.

Plaintiff demurs to the 4th defense set out in defendants' answer, wherein they set forth the final report or account of M. W. Kales as administrator of J. M. Bryan's estate and the action of the probate court thereon, the appointment of M. W. Kales as administrator of said Bryan, deceased; his qualification and entrance upon the duties of such administration, the presentation and allowance by him of the claims of the creditors of said estate, the amount of the claims so allowed, the insufficiency of the assets to pay said claims in full, the decree of the probate court requiring the administrator, said Kales, to distribute the proceeds of the estate ratably among the creditors, the fact that when the proceeds were exhausted that there was still a balance due the creditors, and for demurrer says that said allegations are insufficient in law and do not state facts sufficient to constitute a cause of defense to this action.

5th.

Plaintiff demurs to the 5th defense in defendants' answer, setting up as a defense to their suit that Vina Bryan knew of the sale of the land in controversy by virtue of the judgment in the suit of Kales *vs.* Kales, adm'r; of the purchase thereunder of said land by J. T. Simms, and of his entry into possession thereof thereunder, and of the intended purchase thereof by defendant Brasius, and of
17 her silence, and of his entry into possession under his purchase from Simms, and of her want of objection of Simms' improvements thereon, and of her acquiescence in the proceedings of the probate court and district court, as alleged in defendants' answer, and for demurrer says that said allegations are insufficient in law and do not state facts sufficient to constitute a defense in this action, and the further reason that the acts constituting an acquiescence, ratification, or confirmation are not specifically stated.

6th.

Plaintiff demurs to the 6th defense in defendants' answer, in which they set up that Kales was the owner of the certificate of sale

made to him by Sheriff Orme; that Kales sold same to J. T. Simms; that the sheriff, pursuant to said certificate, executed to said Simms a deed for said land; that Simms was ignorant that Kales, who owned the certificate and sold it to him, was the same individual who appeared as both plaintiff and defendant in the suit of Kales *vs.* Kales, administrator, under the judgment rendered in which case the certificate of sale and deed was made, or that there were any defects in the proceedings in the suit of Kales *vs.* Kales, administrator, and that said Simms and wife, Hannah T. Simms, were or pretended to be the owners and were in possession of the land, as alleged in said answer, and conveyed it to defendant Brasius, &c., and for demurrer says that said allegations are insufficient in law and do not constitute facts sufficient to constitute a cause of action.

7th.

Plaintiff demurs to the entire answer of defendants contained in the first six paragraphs thereof and containing from line 19, on page 1, down to the words "For a seventh defense," on page 18, and for demurrer says that none of the allegations contained in said six paragraphs are sufficient in law and do not state facts sufficient to constitute a defense, and of these his demurrers plaintiff prays the judgment of the court.

BEN. GOODRICH,
W. STREET,
Att'ys for Plaintiff.

18 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

T. J. BRYAN, Plaintiff,
vs.
GEORGE T. BRASIUS *et al.*, Defendants. } No. 761.

Now comes the defendants in the above-entitled cause and, by leave of the court first had and obtained, amend their answer heretofore and on the 22nd day of October, A. D. 1887, filed herein, as follows, to wit:

The said defendants make the following allegations in addition to those contained in their said answer herein and insert the same in said answer in the following specified places, to wit:

First. Said defendants allege and show to the court that plaintiff ought not to be allowed to recover the land and premises mentioned in his said complaint, because that on the 23rd day of February, A. D. 1883, one J. M. Bryan borrowed from one M. W. Kales the sum of twenty-five hundred dollars in U. S. gold coin, and made, executed, and delivered to said M. W. Kales his promissory note therefor, payable on the 23rd day of February, A. D. 1884, without grace, with interest thereon at the rate of one and one-half (1½) per cent. per month from said date of said note until it should be paid; that upon said 23rd day of February, A. D. 1883, to secure the payment of said note, said J. M. Bryan made and executed a mortgage

to said M. W. Kales upon the land and premises described in plaintiff's complaint; which said mortgage was duly acknowledged and recorded on the said 23rd day of February, A. D. 1883, in the office of the county recorder of said county of Maricopa, Territory of Arizona, in Book 2 of Mortgages, page 509, where the same still
19 remains of record, and said records hereby referred to are made a part *of* hereof; that thereafter, to wit, on or about the 29th day of August, 1883, said J. M. Bryan died intestate at said county of Maricopa, Territory of Arizona; that thereafter, to wit, the 24th day of September, A. D. 1883, one M. W. Kales was duly appointed by the probate court of the county of Maricopa, Territory of Arizona, the administrator of the estate of said J. M. Bryan, deceased, and duly qualified as such administrator and entered upon the discharge of the duties of his said office of administrator; that the interest on said principal sum mentioned in said promissory note and said mortgage was paid by said J. M. Bryan down to the 23rd day of May, 1883, but nothing more was paid thereon; that it was provided in and by the terms of said mortgage that in case default should be made in the payment of the principal or interest as in said promissory note provided for, then the said M. W. Kales, who was the party of the second part in said mortgage, his executors, administrators, and assigns, were by said Bryan in and by the said mortgage empowered to sell the said premises; and it was further provided and agreed by said Bryan in and by said mortgage and said note, which formed part thereof, that the said interest should be payable every three months, and if not so paid the said note should be due and payable immediately; that thereafter, to wit, on or about the 28th day of August, A. D. 1883, more than three months' interest on said promissory note became due, and the same was not nor was any part thereof paid, as provided in said promissory note and said mortgage, and by the terms of said note and mortgage both principal and interest became immediately due; that thereafter and on or about the — day of ——, A. D. 1883, M. W. Kales, the said mortgagee named in said mortgage, commenced an action in the district court of the second judicial district of the Territory of Arizona in and for the county of Maricopa, as plaintiff, against on- M. W. Kales, the administrator of the estate of J. M. Bryan, deceased, *was* defendant, for the foreclosure of said mortgage; that thereafter, to wit, on or about the 16th day of October, A. D. 1883, a judgment was duly given, made, and rendered in said action by said
20 court, wherein it was ordered, adjudged, and decreed that the lands and premises described in said complaint be sold to satisfy said mortgage; that thereafter, under and pursuant to said judgment, said lands and premises were sold, in the manner provided by law, by the sheriff of said county of Maricopa; that at such sale one M. W. Kales became the purchaser of the land and premises described in plaintiff's complaint, in good faith; that he paid for said premises described in plaintiff's complaint the sum of two thousand nine hundred and seventy-five dollars, which sum was then the full market value of said premises; that said Gales

paid the said sum of two thousand nine hundred and seventy-five dollars for said premises and the said estate of said J. M. Bryan, deceased, received and had the use and benefit, and it still has the same and every part thereof; that thereafter and on or about the 13th day of June, A. D. 1884, said M. W. Kales duly sold, assigned, transferred, and turned over said certificate of sale made to him by said sheriff to one J. T. Simms by his deed and instrument in writing dated on the day last aforesaid for the sum of three thousand and five hundred dollars; that said sum of three thousand and five hundred dollars was actually paid by said Simms to said Kales at said date in good faith; that thereafter, to wit, on or about the 16th day of June, A. D. 1884, the said sheriff of the county of Maricopa, pursuant to said sale and for and in consideration of said sum of three thousand and five hundred dollars and of said sum of money so bid and paid by said Kales at said sale, did make, execute, and deliver unto said J. T. Simms his deed, whereby he did convey unto said Simms absolutely all the right, title, and interest of said J. M. Bryan at the date of the execution of said mortgage by him to said Kales, to wit, February 23rd, A. D. 1883, or which he or his estate acquired thereafter of, in, or to said premises and every part thereof; that by reason of the premises the said J. T. Simms became the purchaser of said premises in good faith and for a valuable consideration; that immediately after making such purchase said J. T.

21 Simms went into possession of said premises and every part thereof and held the same up to and until the 28th day of February, A. D. 1887, when said Simms and his wife conveyed said premises to the defendant George T. Brasius, who then and thereby became the purchaser thereof in good faith; that on said day said Brasius went into possession of said premises and ever since then has held and now, with his grantees, *now* holds and occupies the same; that since said 16th day of June, A. D. 1884, said Simms, while he was in possession of said premises, and said Brasius, since he went into possession of said premises, and also the other defendants herein severally, who are each severally purchasers of portions of said premises from said Brasius since he became the purchaser thereof, as hereinabove set out, in good faith and for a valuable consideration, did each, severally and in good faith, expend large sums of money in the payment of assessments and taxes upon said premises and in making improvements thereon, amounting to upwards of the sum of seven thousand dollars.

And defendants aver that said principal and interest mentioned in said mortgage has never been paid by the estate of said J. M. Bryan, deceased, nor by the plaintiff or his grantor herein, nor by any one else, nor has the same or any part thereof been tendered to the defendants or either of them, and these defendants do incorporate the foregoing allegations into their said answer filed herein October 22nd, 1887, immediately before the prayer thereof on page 21 of the same.

And those defendants, further answering said complaint, plead not guilty.

Wherefore defendants renew and reiterate the prayer to their answer heretofore filed herein.

CLARK CHURCHILL.

22 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

T. J. BRYAN, Plaintiff,
vs.
GEORGE T. BRASIUS *et al.*, Defendants. } No. 761.

General Demurrer.

Now comes the plaintiff and demurs to the amendments of defendants to their original answer, and for cause of demurrer say- that said amendments are insufficient in law and do not set up any or sufficient facts to constitute a cause of defense.

Special Demurrer.

Now comes the plaintiff and demurs to all that portion of defendants' amendment to their answer which sets up the note of J. M. Bryan to M. W. Kales, of date February 28th, 1883, for $2,500, and the mortgage mentioned in said amendment, given to secure said note, because it appears from the face of said amendment itself that said note and mortgage are barred by the statute of limitation, and that the right of action upon said note accrued more than four years next preceding the filing of said amendment July 7th, 1890.

Wherefore plaintiff moves that the same be stricken out.

23 II.

Plaintiff demurs to all that portion of defendants' amendment to their answer setting up the appointment, by the probate court of Maricopa county, Arizona Territory, of M. W. Kales as administrator of the estate of J. M. Bryan, deceased, and the qualification and entry of said Kales upon the discharge of the duties of administrator of said estate, and setting up that on the default in the payment of the interest of said note that said Kales, under the terms of said mortgage, had the right to declare said note due and payable immediately, both as to principal and interest, and that upon the failure of the payment of said interest by the deceased the said Kales commenced an action in the district court of Maricopa county, Arizona, upon said note and for foreclosure of said mortgage upon the lands which are the subject-matter of controversy in this suit, and the decree of the court foreclosing the lien thereon and ordering a sale of said land, and the sale under the said decree, and the purchase of said lands by said M. W. Kales under said decree and sale, and the transfer of the sheriff's certificate of sale by said Kales to Simms, and the payment of the purchase-money therefor by said Simms to said Kales, and the execution by the sheriff of Maricopa county of a deed to said J. T. Simms purporting to convey all the

right, title, and interest of said Bryan estate at the date of said mortgage by said Bryan to said Kales; the entry into the possession of said land by said J. T. Simms under said judgment, and the sheriff's deed made by virtue thereof; the sale of said land by said Simms and wife to George T. Brasius; the entry into the possession thereof by said Brasius; the payment of taxes and the making of improvements thereon; the non-payment *of* the estate of said Bryan, deceased, of said note and mortgage, and the non-payment by plaintiff or his grantor of said note and mortgage; and for demurrer says—

That it appears upon the face of said amendment itself that at the time of the suit of M. W. Kales against M. W. Kales, ad-
24 ministrator, was commenced the said Kales occupied in said suit the position of both plaintiff and defendant, and that the note and mortgage mentioned in the amendment to said suit was not due, and that at the time the said decree of foreclosure was made the said M. W. Kales, plaintiff, was administrator of the estate of said J. M. Bryan, deceased, and that at the time of the sale under the said decree and the transfer of the sheriff's certificate of sale to said Simms and the execution of the deed of the sheriff, L. Orme, to J. T. Simms that said Kales was still the administrator of said Bryan estate, and that at the time said Kales bid in the land under said decree he was still the administrator of the estate of J. M. Bryan, deceased, and was virtually contracting with himself, and because it appears on the face of said amendment that at all the times mentioned in said amendment said Kales occupied either the position of both plaintiff and defendant, of vender and vendee, of trustee and beneficiary. Wherefore plaintiff moves and prays the court to strike out said portion of said amendment to defendants' original answer.

GOODRICH AND STREET,
Att'ys for Pl'ff.

25 May Term, 1890, Monday, July 7th.

BRYAN
vs. } 761.
BRASIUS.

The court, being fully advised in the premises, sustains the demurrer to the first defense in the answer in this case, sustains the demurrer to the second defense, overrules the demurrer to the third defense, sustains the demurrer to the fourth defense, sustains the demurrer to the fifth defense, and overrules the demurrer to the sixth and seventh defenses.

Leave was asked and granted to amend defendants' answer.

26 November Term, 1890, Dec. 26th, 1890.

Nunc pro tunc entry of July 7th, 1890, May term, page 174.

T. J. BRYAN
vs.
GEORGE T. BRASIUS *et al.* } 761.

This day came on to be heard plaintiff's demurrer to defendants' answer filed October 22nd, 1887, and, the court having heard the arguments of the respective counsel for the parties, orders and adjudges that the demurrers to those portions of said answer designated as the 1st, 2nd, 4th, and 5th defenses be, and — hereby, sustained, to which defendants except, and that said demurrers to those portions of said answer designated as the 3rd, 6th, and 7th defenses be, and the same are hereby, overruled; to which plaintiff excepts.

And at the same time and place there came on to be heard plaintiff's demurrers to defendants' amendments to *them and since*, filed July 7th, 1890, and the court, having duly considered the same, orders and adjudges that said demurrer be, and the same is hereby, overruled; to which plaintiff duly excepted.

Done the seventh day of July, 1890.

27 THOMAS J. BRYAN, Plaintiff,
vs.
GEORGE T. BRASIUS, HENRY W. RYDER, JOHN W. JEFFRIES, JAMES MCCARTHY, GEORGE LORING, and JOHN BACON, Defendants.

The above-entitled cause came on regularly for trial on the 10th day of July, A. D. 1890, before the court, without a jury, Ben. Goodrich and Webster Street, Esqrs., appearing as counsel for plaintiff, and Clark Churchill, Baker and Campbell, and C. F. Ainsworth, Esqrs., appearing as counsel for defendants.

Evidence was introduced and witnesses were sworn and examined in behalf of the plaintiff and of the defendants, and, the evidence being closed, the case was argued and finally submitted to the court and taken under advisement by the court; and now, on this second day of December, A. D. 1890, the court, having fully considered the said cause, renders its decision of said cause in favor of said defendants and against said plaintiff, and orders that judgment be entered herein accordingly.

Wherefore, by reason of the law and the premises, it is ordered, adjudged, and decreed that the plaintiff take nothing by this action, and that the said defendants do have and recover of and from said plaintiff their costs and disbursements herein, taxed at the sum of ninety-two $\frac{35}{100}$ dollars.

28 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

T. J. BRYAN, Plaintiff,
vs.
GEORGE T. BRASIUS *et al.*, Defendants.

I.

Plaintiff's First Bill of Exceptions.

Be it remembered that on the trial of this cause, after the plaintiff had put in all of his affirmative evidence aspiring to show title to the premises in dispute to be in himself and aspiring to show the right of possession thereto by deeds of mesne conveyance from a common source, the defendant, in order to maintain the issue on their behalf, among other things offered in evidence a mortgage given by J. M. Bryan to M. W. Kales, bearing date the 23rd day of February, 1883; to the introduction of which the plaintiff then and there objected for the reason that it did not tend to show in any way title in the defendants and for the reason that upon the face it showed itself to be barred by the statute of limitation, and for the further reason that it appeared upon its face that it had been satisfied. In connection therewith the defendants offered in evidence—to which offer the plaintiff then and there objected—the original promissory note set out in the mortgage, the objections to the same being the same objections that were raised to the mortgage; which objections were overruled by the court and said instruments
29 were admitted in evidence; to which plaintiff then and there excepted and presented this his bill of exceptions to the judge for allowance during the term and within ten days after the conclusion of the trial.

JOSEPH H. KIBBEY, *Judge.*

II.

Plaintiff's Second Bill of Exceptions.

Be it remembered that on the trial of this cause, in order to further maintain the issues on their behalf, among other things the defendants offered in evidence the entire judgment-roll in the cause No. 326 of this court, in the case of M. W. Kales, plaintiff, against M. W. Kales, administrator, defendant, together with the papers in that case; to which offer the plaintiff objected because it was void upon its face, from the fact that it showed that M. W. Kales, the plaintiff in the case, was the same man who was the defendant in the case, and especially when taken in connection with other proofs already introduced by the plaintiff that he was the same man, and there being no denial of the fact, and because it was void; which objection was overruled and the evidence offered was admitted; to which ruling of the court and admission of evidence the plaintiff then and there excepted and presented this his bill of exceptions to

the judge for allowance during the term and within ten days after the conclusion of the trial.

JOSEPH H. KIBBEY, *Judge.*

30 III.

Plaintiff's Third Bill of Exceptions.

Be it remembered that on the trial of thes cause, in order to further maintain the issues on their behalf, among other things defendants offered in evidence the certificate of sale of the premises by the sheriff of Maricopa county and the assignment of that certificate by the purchase at that sale to J. T. Simms, the certificate of sale being to Kales, who bid it off at sheriff's sale; to which offer the plaintiff objected as being irrelevant and immaterial and as not tending to prove title in the defendants; which objection was overruled and said evidence was admitted; to which ruling and admission of evidence plaintiff then and there excepted and presented this his bill of exceptions to the judge for allowance during the term and within ten days after the conclusion of the trial.

JOSEPH H. KIBBEY, *Judge.*

31 IV.

Plaintiff's Fourth Bill of Exceptions.

Be it remembered that on the trial of this cause, in order to further maintain the issues on their behalf, among other things the defendants offered in evidence the deed from Sheriff Orme to J. T. Simms for the property in controversy pursuant to the sale; to which offer the plaintiff objected for the reason that it was immaterial and irrelevant, and because it did not tend to prove title in the defendants, and because it was based upon a judgment that was absolutely void upon its face, and because it appeared upon the face of the judgment that M. W. Kales was the plaintiff and that M. W. Kales was the defendant in the same case, and because he was one and the same individual on the face of the instrument and under the proof; which objection was overruled and the deed admitted in evidence; to which ruling and admission of evidence the plaintiff then and there excepted and presented this his bill of exceptions to the judge for allowance during the term and within ten days after the conclusion of the trial.

JOSEPH H. KIBBEY, *Judge.*

32 *Plaintiff's 5th Bill of Exceptions.*

Be it remembered that on the trial of this cause, in order to further maintain the issues on their behalf, among other things the defendants offered in evidence the deed from J. T. Simms and Hannah T. Simms, his wife, to George T. Brasius for the property in dispute; to which offer the plaintiff objected for the reasin that Simms had no title to the property and because his pretended title

was based on a void judgment and cannot be the foundation of any title in Brasius; which objection was overruled and the deed admitted in evidence; to which ruling of the court and admission of evidence the plaintiff excepts and presented this his bill of exceptions to the court for allowance during the term and within ten days after the conclusion of the trial.

JOSEPH H. KIBBEY, *Judge.*

33 *Plaintiff's Sixth Bill of Exceptions.*

Be it remembered that on the trial of this cause, in order to further maintain the issues on their behalf, among other things the defendants asked their witness, M. W. Kales, to state whether the note and money secured by the mortgage had ever been paid; to which question the plaintiff objected, because it was inadmissable under the pleadings, and because it was set up that that mortgage had been merged into the judgment, and because they did not claim under that mortgage, but under the judgment into which that mortgage is merged; which objection was overruled and defendant was allowed to answer and did make answer; to which ruling of the court and admission of evidence the plaintiff then and there excepted and presented this his bill of exceptions to the court for allowance during the term and within ten days after the conclusion of the trial.

JOSEPH H. KIBBEY, *Judge.*

34 *Plaintiff's Seventh Bill of Exceptions.*

Be it remembered that on the trial of this cause, in order to further maintain the issues in their behalf, among other things the defendants offered to show by the witness Kemper, Wormser, and Montgomery the value of the land at the time of the purchase by J. T. Simms; to which evidence the plaintiff objected, because it was immaterial and irrelevant under the pleadings and because it was illicit testimony as against the title of this plaintiff, but such objection was overruled and the said witnesses were allowed to answer and did answer as to the value of the land at the time; to which ruling of the court and evidences of said witnesses the plaintiff then and there excepted and presented this his bill of exceptions to the court for allowance during the term and within ten days after the conclusion of the trial.

JOSEPH H. KIBBEY, *Judge.*

35 VIII.

Plaintiff's Eighth Bill of Exceptions.

Be it remembered that on the trial of this cause, in order to further maintain the issues in their behalf, among other things the defendants offered in evidence the sheriff's return of the order of sale; which offer was objected to by the plaintiff because it was

founded on a judgment absolutely void on its face by reason of the fact that M. W. Kales was both plaintiff and defendant in the case, and which fact was by the evidence uncontradicted; which objection was overruled and the return was admitted; to which ruling of the court and admission of evidence the plaintiff then and there excepted and presented this his bill of exceptions to the court for allowance during the term and within ten days after the conclusion of the trial.

JOSEPH H. KIBBEY, *Judge.*

36 IX.

Plaintiff's Ninth Bill of Exceptions.

Be it remembered that on the trial of this cause and on the hearing of the plaintiff's general demurrer and special demurrer to this amended answer that the same was overruled and the amended answer as filed by the defendant- was allowed to stand; to which overruling of the plaintiff's demurrer the plaintiff then and there excepted and presented this his bill of exceptions to the court for allowance during the term and within ten days after the conclusion of the trial.

The above bills, numbered I, II, III, IV, V, VI, VII, VIII, and IX, were presented to me on the 9th Dec., 1890, and by me on that day presented to counsel for the opposite party; and now, on the 5th Jan'y, 1891, having examined the same and found them correct, — have signed the same.

JOS. H. KIBBEY, *Judge.*

37 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

T. J. BRYAN, Plaintiff,
vs.
GEORGE T. BRASIUS *et al.*, Defendants.

Now comes the plaintiff and moves the court for a new trial herein and specifies the grounds upon which said motion is founded, to wit:

I.

Errors of law committed by the court as follows, to wit:

That the court erred in overruling plaintiff's demurrer to defendants' amended answer as filed July 7th, 1890, in which he specifies, first, that he demurred to all that portion of defendants' amendment to their answer which sets up the note of Bryan to Kales, of date February 28th, 1883, for twenty-five hundred dollars and the mortgage mentioned in said amendment given to secure the note; and, second, to all that portion of defendants' amendment to their answer setting up the appointment *of* the probate court of Maricopa county of Kales administrator of the estate of Bryan and his quali-

fication and entry upon the discharge of his duties, as appears in the first and second paragraphs of plaintiff's special demurrer to the answer; also for overruling the demurrer to defendants' original answer, filed May 19th, 1890.

38 II.

For the improper admission of defendants' cross-examination of plaintiff's witness, Vina Brown, against the objection of plaintiff, to which he at that time excepted, in which defendant *was* allowed to ask the question, "I will ask you if in '82, '83, '84, '85, '86, and '87 you frequently passed over the land in controversy and saw it;" and as to the time when Brasius became the purchaser of the land, if she knew, and as to whether she knew it had been divided into lots and surveyed, and all questions asked Vina Brown in relation to her knowledge of the division of Central place into lots and of the proceedings of the probate court in reference thereto, and her answer.

III.

Because of errors committed by the court in permitting testimony offered by the defendants against the objection of the plaintiff, which is specified as follows:

The mortgage given by Jonathan M. Bryan to M. W. Kales, bearing date the 23rd of February, 1883, and the note which is recited in the mortgage; also the judgment-roll offered by the plaintiff to show common title in the cause number 326, of M. W. Kales against M. W. Kales, administrator.

IV.

In admitting, under the objection of the plaintiff, the evidence, being the certificate of sale of the property in question by the sheriff and the assignment of the certificate to Simms.

39 V.

In allowing in evidence, under the objection of the plaintiff, the deed from the sheriff, Orme, to Simms; also the deed from J. T. Sims and Hannah T. Sims to George T. Brasius.

VI.

For having admitted in evidence the testimony of J. T. Sims, under the objection of plaintiff, — the time *as to* when he went into possession of Central place (the premises in dispute) and all questions as to improvements which were made upon the premises.

VII.

Also for admitting the testimony of Kales, over the objection of the plaintiff, as to whether the note and money secured by the mortgage had been paid.

VIII.

And for admitting testimony of J. T. Sims, against the objection of the plaintiff, as to the kind of the improvements that he made upon the place, and as to the value of the rents and revenues, and as to the amount of taxes that he had paid for the last three years, and all testimony which he gave as to the circumstances under which he purchased the property, as well as all testimony which he gave as to whether he was acquainted with the people in the Salt River valley at the time of the purchase, and as to whether he had any talk or knew that Kales, administrator, and Kales the plaintiff and Kales the defendant in the same suit was one and the same man.

40 IX.

And for the reason that the court erred in law in ruling that no presumption arose on the complaint in number 326 that M. W. Kales, the plaintiff in that suit, and M. W. Kales, the administrator, are the same, and the ruling that the testimony which was offered to show that they were one and the same party was a contradiction of the records.

X.

In not ruling that the judgment-roll in cause number 326 and the judgment therein were absolutely void, and in not ruling that all the proceedings which were based upon that judgment were too imperfect and void to convey any title.

And in not ruling that the defendants in this action obtained no title through those proceedings, and in admitting them as evidence against plaintiff's title and possession.

XI.

In admitting as evidence the mortgage from J. M. Bryan to M. W. Kales and original promissory note, the certificate of sale by the sheriff, the assignment of that to Sims, the deed from Orme to Sims, the deed from Sims and wife to Brasius, the final account of the administrator Kales, the report of the administrator Kales, the petition of Kales and the order granting letters, the final account and report with endorsements, and also the decree making the final allowance, as evidence against the objection of the plaintiff.

And, specifying further grounds upon which this motion is based, the plaintiff says:

I.

That the judgment is contrary to the law and the evidence, and that it is unsupported by the evidence; that upon the evi-
41 dence and under the law judgment should have been for plaintiff instead of for defendants; that the whole fact shows the plaintiff was the owner of the land in dispute and entitled to the possession of it; that he had been ousted by defendants and that defendants were in possession against plaintiff's right of possession;

that the judgment in No. 326 and certificate of sale from sheriff, sheriff's deed and other deeds by which the defendant came into possession are and were void and gave defendant no rights, title, or right of possession of any part of said premises.

That the deed from Bashford to Bryan and from Bryan to Mrs. Brown and from Mrs. Vina Brown to T. J. Bryan, together with the evidence of Vina Brown that she was the surviving widow and heir-at-law of J. M. Bryan, deceased, clearly establish the title and the right to the possession of the premises in the plaintiff, T. J. Bryan, and that the judgment rendered against Kales in favor of Kales, in number 326, together with the sheriff's certificate of sale and the sheriff's deed and all the proceedings arising thereunder or filed thereafter based upon it conveyed no title whatever or right to a title or right to a possession, and that defendants' holding under the same is holding wrongfully, against plaintiff's right to the possession.

He therefore moves that the judgment rendered on the 2nd day of December, 1890, be set aside, and that he have a new trial.

Dec. 2nd, 1890.

GOODRICH & STREET,
Att'ys for Pl'ff.

42 November Term, 1890, Dec. 16th.

BRYAN
vs. } 761.
BRASIUS *et al.*

Comes now the parties, and, the counsel for plaintiff having argued the motion heretofore filed, the court overruled the motion for a new trial herein and granted ten days to plaintiff in which to file his bill of exceptions and thirty days after the adjournment of this term in which to file his statement of facts, and said plaintiff then and there gave notice of appeal to the supreme court of Arizona from the judgment and from the order overruling the motion for a new trial.

43 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

T. J. BRYAN, Plaintiff,
vs.
GEORGE T. BRASIUS, HENRY W. RYDER, JOHN W. JEFFRIES, James McCarthy, George Loring, and John Bacon, Defendants. } No. 761.

Plaintiff's Bill of Exceptions.

Be it remembered that on the 16th day of December, 1890, there came on to be heard plaintiff's motion for a new trial, which had been regularly filed with the clerk of said court during the term and within two days after the conclusion of the trial; which motion for a new trial is as follows, to wit:

Title of Court and Title of Cause.

Now comes the plaintiff and moves the court for a new trial herein, and specifies the grounds upon whic- said motion is founded as follows, to wit:

I.

Errors of law committed by the court as follows, to wit:

That the court erred in overruling plaintiff's demurrer to the defendants' amended answer as filed July 7th, 1890, in which he specified, first, that he demurred to all that portion of the defendants' amendment to their answer which sets up the notes of Bryan to Kales of date February 28th, 1883, for twenty-five hun-
44 dred dollars, and the mortgage mentioned in said amendment given to secure the note; and, second, to all that portion of defendants' amendment to their answer setting up the appointment *of* the probate court of Maricopa county of Kales administrator of the estate of Bryan and his qualification and entry upon the discharge of his duties, as appears in the first and second paragraphs of plaintiff's special demurrer to defendants' amendments to the original answer, filed July 7th, 1890.

II.

For the improper admission of defendants' cross-examination of plaintiff's witness, Vina Brown, against the objection of plaintiff, to which he at that time excepted, in which defendant was allowed to ask the question: "I will ask you if in '82, '83, '84, '85, '86, and 87 you frequently passed over the land in controversy and saw it," and, as to the time when Brasius became purchaser of the land, if she knew, and as to whether she knew it had been divided into lots and surveyed, and all questions asked Vina Brown in relation to her knowledge of the division of Central Place into lots, and of the proceedings of the probate court in reference thereto and her answers.

III.

Because of errors committed by the court in permitting testimony offered by the defendants against the objections of the plaintiff, which is specified as follows:

The mortgage given by Jonathan M. Bryan to M. W. Kales, bearing date the 23rd of February, 1883, and the note which is recited in the mortgage; also the judgment-roll offered by the plaintiff to show common title in the cause No. 326, of M. W. Kales against M. W. Kales, administrator.

IV.

In admitting, under the objection of the plaintiff, the evidence, being the certificate of sale of the property in question by the sheriff and the assignment of the certificate to Sims.

45 V.

In allowing in evidence, under the objection of plaintiff, the deed from the sheriff, Orme, to Simms, as also the deed from J. T. Sims and Hannah T. Sims to George T. Brasius.

VI.

For having admitted in evidence the testimony of J. T. Sims, under the objection of plaintiff, — the time as to when he went into possession of Central Place (the premises in dispute), and all questions as to his improvements which were made upon the premises.

VII.

Also for admitting the testimony of Kales, over the objection of the plaintiff, as to whether the note and money secured by the mortgage had ever been paid.

VIII.

And for admitting testimony of J. T. Sims, against the objection of the plaintiff, as to the kind of the improvements that he made upon the place, and as to the value of the rents and revenues, and as to the amount of taxes that he paid for the last three years, and all testimony which he gave as to the circumstances under which he purchased the property, as well as all testimony which he gave as to whether he was acquainted with the people in the Salt River valley at the time of the purchase, and as to whether he had any talk or knew that Kales, administrator, and Kales the plaintiff and Kales the defendant in the same suit was one and the same man.

IX.

And for the reason that the court erred in law in ruling that no presumption arose on the complaint in number 326 that M. W. Kales the plaintiff in that suit and M. W. Kales the administrator are the same, and for ruling that the testimony which was offered to show that they were one and the same party was a contradiction of the records.

46 X.

In ruling that the judgment-roll in cause No. 326 and the judgment therein were absolutely void, and in not ruling that all the proceedings which were based upon that judgment were too imperfect and void to convey any title, and in not ruling that the defendants in this action obtain no title through these proceedings, and in admitting them as evidence against plaintiff's title and possession.

XI.

In admitting as evidence the mortgage from J. M. Bryan to M. W. Kales, and original promissory note, the certificate of sale by the sheriff, the assignment of that to Sims, the deed from Sims and wife

to Brasius, the final account of the administrator, Kales, the report of the administrator, petition of Kales, and the order granting letters, the final account and report, with endorsements, and also the decree making the final allowance, as evidence against the objection of the plaintiff.

And, specifying further grounds upon which this motion is based, the plaintiff says:

I.

That the judgment is contrary to the law and the evidence, and that it is unsupported by the evidence; that upon the evidence and under the law judgment should have been for plaintiff instead of for defendants; that the whole fact shows the plaintiff was the owner of the land in dispute and entitled to the possession of it; that he had been ousted by defendants, and that defendants were in possession against plaintiff's right of possession; that the judgment in No. 326 and certificate of sale from the sheriff, sheriff's deed and other deeds, by which defendant- came into possession, are and were void, and gave defendants no right, title, or right of possession of any part of said premises; that the deed from Bashford to Bryan and from Bryan to Mrs. Brown and from Mrs. Vina Brown to T. J.
47 Bryan, together with the evidence of Vina Brown that she was the surviving widow and the heir-at-law of J. M. Bryan, deceased, clearly established the title and the right to the possession of the premises in the plaintiff, T. J. Bryan, and that the judgment rendered against Kales in favor of Kales in No. 326, together with the sheriff's certificate of sale and the sheriff's deed, and all the proceedings asising thereunder or filed thereafter, based upon it, conveyed no title whatever or right to title or right to a possession, and that defendants' holding under the same is holding wrongfully, against plaintiff's right to the possession.

He therefore moves that the judgment rendered on the 12th day of December, 1890, be set aside and that he have a new trial.

Dec. 12th, 1890.

GOODRICH & STREET,
Attorneys for Plaintiff.

Yet, notwithstanding the consideration of all said testimony produced upon the trial and all objections set out in the motion for a new trial, the court overruled plaintiff's motion for a new trial and allow- the judgment which was theretofore entered, on the 12th day of December, 1890, to stand as a valid judgment; which judgment is as follows, to wit:

THOMAS J. BRYAN, Plaintiff,
vs.
GEORGE T. BRASSIUS, HENRY W. RYDER, JOHN W. JEFFRIES, James McCarthy, George Loring, and John Bacon, Defendants. } No. 761.

48 The above-entitled cause came regularly on for trial on the 18th day of July, 1890, before the court without a jury

Ben. Goodrich and Webster Street, Esqs., appearing as counsel for plaintiff, and Clark Churchill, Baker and Campbell, and C. F. Ainsworth, Esqs., appearing as counsel for defendant.

Evidence was introduced and witnesses sworn and examined in behalf of the plaintiff and of the defendants, and the evidence being closed, the case was argued and finally submitted to the court and taken under advisement by the court; and now, on the 12th day December, 1890, the court, having fully considered said cause, renders its decision of said cause in favor of said defendants and against said plaintiffs, and orders that judgment be entered herein accordingly.

Wherefore, by reason of the law and the premises, it is ordered, adjudged, and decreed that the plaintiff take nothing by his action, and that the said defendants do have and recover of and from said plaintiff their costs and disbursements herein, taxed at the sum of ninety-two and $^{35}_{100}$ —.

To all of which ruling, the overruling of plaintiff's motion for a new trial, and the allowance of said judgment to stand, the plaintiff then and there excepted and presented this his bill of exceptions during the term and within ten days of the conclusion of the trial in that particular to the court for allowance, and the same was allowed.

Presented to me on the 23rd day of December, A. D. 1890, and by me on said day presented to the counsel for the opposite party; and now, having examined the same and found it to be correct, I have, this 5th day of January, 1891, signed the same.

JOS. H. KIBBEY, *Judge.*

49 PHŒNIX, *Decembor 23rd*, 1890.

We hereby admit that the foregoing bill of exceptions was presented to the judge of the court by the plaintiff for allowance on the 23rd day of December, 1890, and the same was by him submitted on that day to the attorneys for the defendants; all of which is done within ten days after the motion for a new trial was overruled and during the same term of court.

BAKER & CAMPBELL,
Att'ys for Def'ts.

50 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

T. J. BRYAN, Plaintiff,
vs.
GEORGE T. BRASIUS, HENRY W. RYDER, JOHN W. JEFFRIES, James McCarthy, George Loring, and John Bacon, Defendants. } No. 761.

Statement of Facts.

I.

This is an action of ejectment for the northeast quarter of section 5, township 2, range 3 east, G. and S. R. M., situated in Maricopa

county, Arizona, brought by the plaintiff against the defendant in the district court of the second judicial district of the Territory of Arizona, county of Maricopa, upon a complaint filed therein on the 11th day of July, 1887.

The defendants filed their respective answers.

The cause came on regularly for trial at a regular term of said court.

The plaintiffs and defendants appeared and were represented by their respective counsel.

A jury was expressly waived by all the parties to the action and the cause was tried to the court.

The pleadings of the respective parties were read to the court; whereupon the evidence was then adduced, and showed the following facts:

51 I.

On the 31st of January, 1881, Francis A. Bashford was the owner of and on that day conveyed to Jonathan M. Bryan the N. E. ¼ of sec. 5, T. 1 N., R. 3 E., G. & S. R. M., by warranty deed duly made, executed, and delivered on that day and recorded in Book 8 of Deeds, page 570, records of Maricopa county, on the 10th day of January, 1883.

At that time the said J. M. Bryan was a married man and married to Vina Bryan, whose name appears hereafter as Vina Brown.

That afterwards, to wit, on the 29th day of August, 1883, said J. M. Bryan died without children and left as sole heir the said wife, Vina Bryan, who then became his heir and widow.

That afterwards, to wit, on the thirteenth day of September, 1883, the said M. W. Kales filed his application for letters of administration in the probate court of Maricopa county, Territory of Arizona, wherein said Bryan resided at the time of his death and where his estate was situated, and such proceedings were had thereon that the said M. W. Kales was duly appointed and became the administrator of said estate on the 24th day of September, 1883, and continued as such until the administration was closed, December 6th, 1884. Such proceedings were had also in the administration of said estate that on the 6th day of December, 1884, the administration of said estate was settled and closed and the said administrator was discharged from said trust.

Said N. E. ¼ of sec. 5, T. 1 N., R. 3 E., G. & S. R. M., was not distributed by any such probate proceedings by the administrator in the administration of said estate.

That afterwards the said Vina Bryan, the widow of said J. M. Bryan, deceased, married one R. D. Brown.

52 1.

That afterwards, to wit, on the 28th day of June, A. D. 1887, the said Vina Bryan, in her name as it then was, Vina Brown, for the consideration of one dollar, conveyed to this plaintiff, T. J. Bryan, by deed of conveyance granting, conveying, remising, releasing,

and forever quitclaiming all of the N. E. ¼ of sec. 5, T. 1 N., R. 3 E., G. & S. R. M., the premises aforesaid, which deed was dated on that day and duly acknowledged and recorded on the 30th day of June, 1887, in Book 15 of Deeds, page —, Maricopa county records.

That said deed from Francis A. Bashford, dated on the 31st day of October, 1881, is a common source of title both for plaintiff and defendants.

II.

That during his lifetime and while he was still married to the said Vina Bryan, to wit, on the 23rd day of February, 1883, the said J. M. Bryan made, executed, and delivered a promissory note to one M. W Kales for the sum of $2,500.00, payable on the 23rd day of February, 1884, with interest at the rate of one and one-half per cent. per month, and at the same time and while he was the owner of said N. E. ¼ of sec. 5, T. 1. N., R. 3 E., G. & S. R. M., he made, executed, and delivered to the said Kales a mortgage of all the said N. E. ¼ of sec. 5, T. 1 N., R. 3 E., G. & S. R. M., for the purpose of securing the said promissory note; which said mortgage was duly acknowledged and delivered to said Kales and recorded on the 23rd day of February, 1883, in Book 2 of Mortgages, page 509, of records of Maricopa county.

Defendants claim title and right of possession to the premises by sheriff's deed, based upon an order of sale issued out of the district court of the second judicial district of the Territory of Arizona on an action founded on the said promissory note and mortgage executed by said Jonathan M. Bryan to said M. W. Kales on the 23rd day of February, 1883; the facts of which suit and action are as follows:

The said M. W. Kales, while he was the administrator of the estate of J. M. Bryan, deceased, aforesaid, and while he was the
53 owner of said note and mortgage, brought an action in said district court by a complaint filed on the 28th day of September, 1883, in which he, M. W. Kales, as plaintiff, sued himself, M. W. Kales, administrator of the estate of J. M. Bryan, deceased, defendant, and in which he complained upon said promissory note and said mortgage and asked for judgment upon the note and foreclosure of the mortgage and the sale of the premises thereby conveyed to satisfy said judgment. A summons was duly issued out of said court on the 5th day of October, 1883, and duly served on M. W. Kales, administrator, the defendant named in the action, on the same day, and afterwards, on the 6th day of October, 1883, the said M. W. Kales, administrator, defendant, made answer and admitted each and every allegation of the said complaint, and consented that judgment or decree be entered in accordance with the prayer thereof.

That afterwards, to wit, on the 9th day of October, 1883, the same being a day of the regular term of said court, the said cause came on for trial, and, the same having been tried and duly submitted, the said court, on the 16th day of October, 1883, rendered judgment against M. W. Kales, administrator of the estate of J. M.

Bryan, defendant, in favor of M. W. Kales, plaintiff, for the sum of 2,670 dollars, and entered a decree to foreclose said mortgage & ordered that the N. E. ¼ of sec. 5, T. 1 N., R. 3 E., G. & S. R. M., be sold to satisfy said judgment.

That afterwards, to wit, on the 8th day of November, 1883, an order of sale for the sale of said premises was issued out of the said court on said judgment and delivered to the sheriff of Maricopa county for execution.

That afterwards, to wit, on the 15th day of December, 1883, the said sheriff of Maricopa county, having advertised said N. E. ¼ of sec. 5, T. 1 N., R. 3 E., G. & S. R. M., for sale under said judgment for the time prescribed by law, did offer the same for sale to the highest bidder for cash, and did then sell the same to M. W. Kales for the sum of $2,975.00, that being the highest price bid, and did then issue to said M. W. Kales a certificate of sale therefor,
54 which certificate of sale was sold and assigned to J. H. Sims for the sum of thirty-five hundred (3,500) dollars on the 13th day of June, 1884.

That afterwards, to wit, on the 16th day of June, 1884, the said sheriff of Maricopa county made, executed, and delivered to J. T. Sims, the assignee of said certificate of sale, a sheriff's deed to said property, which deed was recorded on the same day in Book 10 of Deeds, page 353, Maricopa county records.

That afterwards, to wit, on the 28th day of February, 1887, J. T. Sims and his wife, Hannah T. Sims, made, executed, and delivered to George T. Brasius, for the consideration of $59,000, the N. E. ¼ of sec. 5, T. 1 N., R. 3 E., G. & S. R. M.

III.

To prove which facts on the part of the defendants, they introduced in evidence:

First. A mortgage conveyed for the N. E. ¼ of sec. 5, T. 1 N., R. *R.* 3 E., G. & S. R. M., executed by J. M. Bryan on the 23rd day of February, 1883, to M. W. Kales to secure the payment of a note given by J. M. Bryan to M. W. Kales, bearing the same date, for 2,500 dollars, with interest thereon at one and one-half per cent per month, payable February 23rd, 1884, which mortgage was recorded February 23rd, 1883, on Maricopa county records.

Second. The judgment-roll in the case of M. W. Kales against M. W. Kales, administrator of the estate of J. M. Bryan, deceased, foreclosing the mortgage just referred to, being case No. 326 of the second district court of Arizona, county of Maricopa.

Third. The order of sale issued upon the judgment and decree contained in the judgment-roll in said case No. 326, dated the 8th day of November, 1883, together with the return of the sheriff thereon, which showed that on the 15th day of December, 1883, the sheriff of Maricopa county sold said N. E. ¼ of sec. 5, T. 1 N., R. 3 E., G. —S. R. M., for 2,975 dollars, and that he paid that amount for it.

55 Fourth. The sheriff's certificate of sale from said sheriff, L. H. Orme, to M. W. Kales, dated 15th December, 1883, for

said N. E. ¼ of sec. 5, T. 1 N., R. 3 E., G. & S. R. M., and the assignment thereof to J. T. Sims for 3,500 dollars, dated June 13th, 1884.

Fifth. The sheriff's deed from said sheriff, L. H. Orme, to J. T. Sims for said N. E. ¼ of sec. 5, T. 1 N., R. 3 E., G. & S. R. M., dated and executed June 16th, 1884, and recorded June 16th, 1884, Maricopa county records.

Sixth. A grant, bargain, and sale deed from J. T. Sims and Hannah T. Sims, his wife, to George T. Brasius, executed on the 28th day of February, 1887, for the N. E. ¼ of sec. 5, T. 1 N., R. 3 E., G. & S. R. M., consideration $59,000, and recorded March 6th, 1887, in Maricopa county records.

IV.

It was admitted that M. W. Kales, the plaintiff in said suit No. 326, was the same person as M. W. Kales, administrator, the defendant in said suit; that at the time of commencement of this cause of action the defendants were in possession of said premises.

That none of said property was sold by the administrator of the Jonathan M. Bryan estate in the course of administration.

That the note and mortgage given by said J. M. Bryan to M. W. Kales, mentioned in the complaint in the case of M. W. Kales *vs.* M. W. Kales, administrator, have not been paid nor satisfied unless they have been paid by the sale under the foreclosure proceedings hereinbefore mentioned.

That immediately after the purchase of the premises by said J. T. Sims he entered into the possession of said premises, and that until the present time he and those claiming under him have remained and still are in possession of the same; that said Sims from said date and those claiming under him have paid taxes upon said premises; that after said Sims received the sheriff's deed of said premises he and those claiming under him have made valu-
56 able improvements upon said premises, which remain thereon, without any notice of the claim of plaintiff or his grantors except such notice, if any, that may have been imparted by the record, as hereinbefore described.

That at the time when said Sims purchased and paid the purchase-money for said premises he did not know and had no notice that M. W. Kales, from whom he purchased the same, was the same person who was the administrator of the estate of J. M. Bryan, deceased, except such notice, if any ther- was, which was imparted by the record hereinbefore described.

That at the said sale made by the said sheriff the said premises were sold for their market value.

The foregoing is agreed upon as the statement of facts in said cause.

March 13, 1891.

GOODRICH & STREET,
Att'ys for Plaintiff.
CLARK CHURCHILL,
BAKER & CAMPBELL,
Att'ys for Def'ts.

Examined, found correct, signed, and approved this 13th March, 1891.

JOSEPH H. KIBBEY, *Judge.*

57 In the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Maricopa.

T. J. BRYAN, Plaintiff,
vs.
GEORGE T. BRASIUS, HENRY T. RYDER, JOHN W. JEFFRIES, James McCarthy, George Loring, and John Bacon, Defendants. } No. 761.

Whereas, in the above numbered and entitled cause, pending in the district court of the second judicial district in and for the county of Maricopa and at a regular term of said court, to wit, on the second day of December, A. D. 1890, the said George Loring and John Bacon, George T. Brasius, Henry W. Ryder, John W. Jeffries, James McCarthy recovered judgment against the said *J. T.* Bryan "that the plaintiff take nothing by the action, and that the said defendants do have and recover of and from said plaintiff their costs and disbursements herein, taxed at the sum of ninety-two and $\frac{35}{100}$ dollars," from which judgment the said T. J. Bryan has taken an appeal to the supreme court of the Territory of Arizona and desires to suspend the execution of said judgment during the pendency of said appeal:

Now, therefore, we, T. J. Bryan, as principal, and W. T. Smith and C. H. Gray, as sureties, acknowledge ourselves bound to pay George T. Brasius, Henry W. Ryder, John W. Jeffries, Jaces McCarthy, George Loring, and John Bacon the sum of five hundred dollars, conditioned that the said T. J. Bryan shall prosecute his appeal with effect and will pay all costs which have accrued in the court below and which may accrue in the appellate court, and in case the judgment of the appellate court shall be against him that he will perform its judgment, sentence, or decree and will pay all such damages as may be awarded against him on the appeal.

58 T. J. BRYAN. [SEAL.]
W. T. SMITH. [SEAL.]
C. H. GRAY. [SEAL.]

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

W. T. Smith and C. H. Gray, the sureties, being duly sworn, each for himself says that he is a resident freeholder of Maricopa county, and that he is worth the sum of five hundred dollars, the amount for which he has signed the foregoing bond, over and above his just debts and liabilities, exclusive of property exempt from execution.

W. T. SMITH.
C. H. GRAY.

Subscribed and sworn to before me this 19th day of December, A. D. 1890.

FRANK COX,
Notary Public.

[NOTARIAL SEAL.]

This bond on appeal was submitted to me on this 21st day of January, A. D. 1891, and was by me approved on that day, both as to the amount and the form of the bond and the sufficiency of the sureties, and filed by me on the 21st day of January, A. D. 1891, as an appeal bond in this case.

J. H. STOUT, *Clerk.*

59 In the Supreme Court of the Territory of Arizona.

T. J. BRYAN, Plaintiff,
vs.
GEORGE T. BRASIUS *et al.*, Defendant. } District Court No., 761. Supreme Court No., —.

Assignment of Errors.

The plaintiff and appellant assigns for errors as follows, to wit:

First assignment of error.

The court erred in allowing as evidence the mortgage given by J. M. Bryan to M. W. Kales, bearing date the 23rd day of February, 1883, and the promissory note set out in the mortgage, as appears in plaintiff's first bill of exceptions.

Second assignment of error.

In allowing as evidence the entire judgment-roll in district court, No. 326, as set out in plaintiff's second bill of exceptions.

Third assignment of error.

In allowing as evidence the certificate of sale of the premises by the sheriff and the assignment of that certificate to J. T. Sims, as appears in plaintiff's third bill of exceptions.

Fourth assignment of error.

In allowing as evidence the deed from Sheriff Orme to J. T. Simms, as appears in plaintiff's fourth bill of exceptions.

Fifth assignment of error.

In allowing as evidence the deed from J. T. Simms and Hannah T. Simms, his wife, to George T. Brasius, as appears in plaintiff's fifth bill of exceptions.

60 Sixth assignment of error.

In allowing defendants' witness Kales to testify that the note and money secured by the mortgage had never been paid, as appears

in plaintiff's sixth bill of exceptions; in allowing the defendant to show by the witnesses the value of the land at the time of the purchase by J. T. Sims, as appears in plaintiff's seventh bill of exceptions.

Seventh assignment of error.

In allowing as evidence the sheriff's return, the order of sale, as appears in plaintiff's eighth bill of exceptions.

Eighth assignment of error.

In overruling plaintiff's general demurrer and special demurrer and allowing the amended answer filed by the defendant to stand, as appears in the plaintiff's ninth bill of exceptions, and in overruling the demur-er to the answer filed May 19th, 1890.

Ninth assignment of error.

In overruling plaintiff's motion for a new trial and in holding that the errors alleged to have been committed by the court, as specified in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, in plaintiff's bill of exceptions to the overruling of his motion for a new trial, were not errors sufficient to grant a new trial, either collectively or singly.

Tenth assignment of error.

The court erred in rendering judgment for the defendant instead of for the plaintiff upon the whole evidence.

Eleventh assignment of error.

The court erred in not rendering judgment for the plaintiff instead of for the defendant under the whole evidence, for that the whole evidence shows that under the law the plaintiff was the owner and entitled to the land in dispute and was entitled to the possession of it and had been ousted therefrom by defendants,
61 and that defendants were in possession against plaintiff's right of possession; that the judgment and certificate of sale from the sheriff and the sheriff's deed and all subsequent deeds founded thereon by which defendants got into possession were void and gave defendants no right or title or right to the possession of any part of said premises.

Wherefore this plaintiff and appellant prays that the judgment of the district court be set aside.

Second. That this supreme court render such judgment as the court below should have rendered and adjudge that this plaintiff have judgment against the defendant for the possession of the premises in dispute.

Third. Or if the supreme court shall not proceed to render such judgment, then that the judgment of the district court be reversed and the plaintiff have a new trial.

GOODRICH & STREET,
Att'y- for Appellant.

62 TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

I, C. H. Knapp, clerk of the district court, third judicial district of the Territory of Arizona, in and for the county of Maricopa, do hereby certify the foregoing to be a full, true, and correct transcript of the judgment-roll, the pleadings, summons, minute entries, bill of exceptions, statement of facts, motion for a new trial, order overruling same, the final judgment, motion of appeal in open court, bond on appeal and assignment of errors, and of the proceedings had in the action entitled T. J. Bryan, plaintiff, *vs.* George T. Brasius, Henry W. Ryder, John W. Jeffries, James McCarthy, George Loring, and John Bacon, defendants; and I further certify that the November term, 1890, at which final judgment thereon was rendered, has not been finally adjourned.

In witness whereof I have hereunto set my hand and affixed the seal of said district court this 18th day of August, A. D. 1891.

[SEAL.] C. H. KNAPP, *Clerk.*

Appellant's costs, $45.30.
Appellees' costs, $93.35.
Transcript demanded by Goodrich & Street April 8th, 1891.
Transcript delivered to Goodrich & Street August 22nd, 1891.

63 In the Supreme Court of the Territory of Arizona.

T. J. BRYAN, Appellant, }
vs. } No. 325.
GEORGE T. BRASIUS *et al.*, Appellee. }

Judgment.

This cause having been fully argued to the court by the respective counsel and heretofore submitted and by the court taken under advisement, and the court having fully considered the same and being fully advised in the premises, it is now by the court ordered, adjudged, and decreed that the judgment rendered in this cause in the court below be affirmed, and the same is hereby affirmed.

It is hereby further ordered that the appellee do have and recover of the appellant his costs expended herein, taxed at —, and have execution therefor.

Opinion by Henry C. Gooding, chief justice, associate justices R. E. Sloan and E. W. Wells concurring.

September 29, 1892.

64 In the Supreme Court of the Territory of Arizona.

T. J. BRYAN, Appellant,
vs.
GEORGE T. BRASIUS, HENRY W. RYDER, JOHN W. JEFFRIES, James McCarthy, George Loring, and John Bacon, Appellees. } No. 325.

Statement of facts by the supreme court of the Territory of Arizona, in the nature of a special verdict, on appeal to the Supreme Court of the United States.

This cause came on to be tried in the supreme court of Arizona sitting as a court of appeal, on the foregoing transcript, on appeal from the district court of the second (now third) judicial district of Arizona, where the case was tried by the court without a jury, a jury having been expressly waived.

The supreme court takes the facts found by the district court on the trial of the cause in that court, and as agreed to by the counsel for the respective parties, as the facts in the case and makes such statement of facts as found in the transcript a part of this statement of facts.

From such transcript this court finds that the district court did not commit error in doing the things set out in any of plaintiff's bills of exceptions; that the district court did not commit error in overruling plaintiff's motion for a new trial and as set out in his bill of exceptions in that particular; that the district court did not commit error in doing the things set out in appellant's assignment of error on appeal to the supreme court of Arizona; and this
65 supreme court further finds that the judgment of the district — ought to be affirmed, and judgment of affirmance is therefore rendered as follows, to wit:

In the Supreme Court, Territory of Arizona.

T. J. BRYAN, Appellant,
vs.
GEORGE T. BRASIUS, HENRY W. RYDER, JOHN W. JEFFRIES, JAMES MCCARTHY, GEORGE LORING, and JOHN BACON, Appellees.

This cause having been fully argued to the court by the respective counsel and heretofore submitted and by the court taken under advisement, and the court having fully considered the same and being fully advised in the premises—

It is now by the court ordered, adjudged, and decreed that the judgment rendered in this cause in the court below be affirmed, and the same is hereby affirmed; and it is hereby further ordered that

the appellee do have and recover of the appellant *his* costs expended herein, taxed at $—, and have execution therefor.

September 29, 1892.

The above statement is correct.

CLARK CHURCHILL,
Attorney for Appellees.
GOODRICH AND STREET,
Attorneys for Appellant.

HENRY C. GOODING,
Chief Justice of the Supreme Court of Arizona.

66 In the Supreme Court of the Territory of Arizona.

T. J. BRYAN, Appellant,
vs.
GEORGE T. BRASIUS, HENRY W. RYDER, JOHN W. JEFFRIES, JAMES MCCARTHY, GEORGE LORING, and JOHN BACON, Appellees.

Appeal from the second judicial district—Joseph H. Kibbey, judge.

Opinion by H. C. Gooding, C. J.

This is an action of ejectment brought by appellant as plaintiff in the court below against appellees to recover possession of the northeast quarter of section five, township one north, range three east, Gila and Salt River meridian.

The answer was "not guilty" and facts in estoppel hereafter set out. In stating the case I shall endeavor to set out briefly all the facts necessary to fairly present the issues of law and fact.

The real estate in question was the property of one J. M. Bryan in his lifetime. At his death he left his widow, Vina Bryan, his sole heir, to whom the real estate descended and belonged if not diverted by the proceedings hereinafter mentioned. Vina Bryan subsequently became Vina Brown by marriage. The property was community property. After the death of J. M. Bryan M. W. Kales became the administrator of his estate.

While administrator M. W. Kales brought an action on a note and mortgage to secure the same, executed by J. M. Bryan
67 against M. W. Kales, as administrator of the estate of J. M. Bryan, deceased, to foreclose the said mortgage. The note was for twenty-five hundred dollars, and the mortgage was on the property above described. A decree was entered in said action in the district court, and in pursuance thereof the said property was sold, the plaintiff being the purchaser. Vina Bryan was not a party to this action, nor to the note or mortgage, nor was there any other defendant save M. W. Kales. In short, M. W. Kales in his individual capacity brought the suit against himself in his capacity as administrator of the estate of J. M. Bryan, deceased; had summons issued and served upon himself; appeared to the action, and admitted the complaint; got an order of sale and became the

purchaser, paying the then full market value of the property, and the estate received the full benefit thereof. Said Kales received a certificate of purchase. He subsequently sold the certificate to one J. T. Sims, who afterwards received a sheriff's deed and went into possession, paid taxes, and made valuable and lasting improvements. Simms subsequently sold thesame to Brasius for a much larger sum than Kales or Simms had paid. Brasius was in possession at the time this action was commenced. Simms did not know that Kales, plaintiff in the foreclosure proceedings, and Kales, administrator, defendant, was one and the same person, unless that knowledge or notice was imparted by the record showing identity of name of plaintiff and defendant, nor did Brasius have any more knowledge or notice of that fact than the record so imparted; that such was the fact, however—that is, that Kales, plaintiff, and Kales, defendant, were one and the same person—is admitted in the statement of facts in this case. This action of foreclosure above mentioned was in the district court in and for Maricopa county.

The premises in question were never sold or distributed by any probate proceedings. Long before the commencement of this action the estate of J. M. Bryan had been fully administered and the administrator discharged; that after said discharge Vina Bryan, then Vina Brown, for one dollar, granted, conveyed, remised, released, and forever quitclaimed the land in controversy to plaintiff, appellant.

68 It is claimed on the part of the appellant that the proceedings and decree in the foreclosure were void, and the sale thereunder, because Kales was both plaintiff and defendant, and a large number of cases are cited to sustain that contention. These cases when examined are not, I think, in point. They express the proposition that a man cannot sue himself. Oher cases are cited to the effect that identity of name is evidence of identity of person. Coupling these two propositions, it is argued that the decree in the case Kales *vs.* Kales is void, and all proceedings thereunder; but there is no case cited whereon, on the face of the pleadings and decree, the court has held in a collateral proceeding the judgment or decree to be void because of the identity of the name of the plaintiff and defendant; that identity of name is *prima facie* evidence of identity of person is abundantly established by the cases cited, but the cases do not involve the judgment or decree of a court of general jurisdiction where the same is offered in evidence in a collateral proceeding.

They are cases where the rule may well be applied. They are cases where the name of the grantee subsequently appears as a grantor in a chain of title, and like cases. In such cases clearly the rule may well be applied that identity of name is *prima facie* evidence of identity of person. They are not cases where the parties occupy adverse relations and where the proceedings have passed to judgment.

The presumption of the regularity and validity of the proceedings of courts of general jurisdiction is sufficiently strong, in my opinion, to overcome the presumption of identity of person arising

from identity of name in a judgment or decree where the same is offered in evidence; but in this case it is admitted in the statement of facts that Kales, plaintiff, and Kales, defendant, were one and the same person. This I think an admission that it was competent for the parties to make, and must therefore bind them in this case for whatever force and effect it may have. Whether this fact could have been proved by parol if objection had been made does not arise in this case, as the fact was admitted, as appears by the statement of facts.

With this admission in the record, the question arises,
69 What effect does it have on the rights of Brasius, as a purchaser through Kales and Simms? It is also in the statement of facts that neither Simms -or Brasius had any knowledge or notice of the fact that Kales, plaintiff, and Kales, defendant, were one and the same person, unless the record imparted such notice or knowledge. As there is no presumption of identity of person from identity of name, where a judgment or decree of a court of general jurisdiction shows the name as plaintiff and defendant I think neither Simms nor Brasius chargeable with notice of the identity of person. In other words, they are innocent purchasers, so far as purchasers at a judicial sale can be.

But does that give them title as against Vina Brown's grantee? If the decree itself was void or if it was such a decree that it could not operate as an estoppel as against the sole heir, Vina Brown, what right or title did Simms or Brasius get as against the grantee of Vina Brown?

That Kales could not himself have claimed title to the property by virtue of the foreclosure proceedings alone as against Vina Brown I think is quite clear, unless I should hold that a man can in his individual capacity sue himself in his representative capacity as administrator and obtain a decree that would bind and estop the heirs.

For a judgment or decree to operate as an estoppel I think there must be adverse parties, and that a man in his individual capacity suing himself as administrator does not obtain a judgment or decree that he can set up as an estoppel against any one, nor can he take title under and by virtue of such a judgment or decree. There may be facts in pais that would operate in connection with such proceedings to protect his possession and perhaps inure title in time, but no title by virtue of the proceedings alone. But it is contended that Sims and his grantee, Brasius, are innocent purchasers and therefore took title to the property and should be protected as owners. If the court had no power to make the decree and there were no facts in pais, of course no title could be acquired by any one. If the decree did not bind Vina Brown and no act or failure to act on her part operated as an estoppel in pais, would Simms or Brasius occupy any better position in law than one who
70 buys a title to real estate apparently faultless on the face of the records but subject to the fatal infirmity of a forged deed or power of attorney in the chain of title?

A party must have his day in court or he is not bound by the

proceedings, however innocent (if we may use that term in such connection) the purchaser may be who seeks to deraign title thereunder.

Of course, if the title still remained in Vina Bryan or Vina Brown, she could convey it to her grantee. If the case stopped here I would think the decree below should be reversed, but the facts of the case disclose an indebtedness of twenty-five hundred dollars to Kales from T. J. Bryan and a mortgage to secure the same on the property in dispute—a proceeding in court in good faith and without fraud on the part of Kales or any one to foreclose the mortgage (the proceeding thought to be valid and regular on its face), a sale under the decree of the court and possession taken in pursuance thereof and taxes paid and valuable and lasting improvements made by the purchaser and his grantee.

The plaintiff brings suit by action of ejectment. He does not pay or offer to pay the mortgage debt. In this Territory the action of ejectment is based upon the right of possession. I think, on the very best authority and the highest equity, the defendant must be held to be the mortgagee in possession and subrogated to the rights of Kales under his mortgage and entitled to remain in possession till the requirements of equity are fully met. On this proposition it is only necessary to refer to the following authorities: 22 Pac. Rep., 945; 10 Johnson N. Y., 479; 30 Am. Dec., 58; 14 Wend., 233.

But it is claimed by appellant that the debt secured by the mortgage was barred by the statute of limitations at the commencement of this action and therefore need not be paid. I do not think a court of equity would ever allow the statute to have that effect. It would be so inequitable and shocking to all sense of right that a court exercising equitable powers, as this court does, and recognizing equitable defenses in an action of ejectment would never disturb the possession of a mortgagee in peaceable and quiet
71 enjoyment under legal proceedings, valid or invalid, until the mortgage debt was paid and all other requirements of equity fully met. If the decision in this case rested solely on this last proposition the case should perhaps be remanded for an accounting, etc.

But, as a majority of this court think the judgment of the court below should be affirmed on other grounds as well, the judgment of the court below will simply be affirmed.

HENRY C. GOODING, *C. J.*
EDMUND W. WELLS, *A. J.*

I concur in the judgment.

While concurring in the judgment, I am unable to concur in the view that the judgment in the case of M. W. Kales *vs.* M. W. Kales, administrator, does not constitute an estoppel of record binding upon appellant herein.

I hold that the rule of evidence that from identity of name identity of person is to be presumed has no application to a judgment of a court of general jurisdiction, where the effect of such application

would be to destroy the presumption of the regularity of such judgment.

If this be true, I think the judgment in the case of Kales *vs.* Kales, administrator, was not void upon its face and open to attack in this action. At the oral decision in this cause I expressed a different view from this, but subsequent reflection and a further examination of the authorities has led to the conclusion reached and expressed by me in Bryan *vs.* Kales, decided at this term.

RICHARD E. SLOAN, *A. J.*

72 *Minute Entry.*

In the Supreme Court, Territory of Arizona.

T. J. BRYAN, Appellant,
vs.
GEORGE T. BRASIUS, HENRY W. RYDER, JOHN W. JEFFRIES, JAMES MCCARTHY, GEORGE LORING, and JOHN BACON, Appellees.

And now, in open court, on the first day of October, 1892, the appellant, T. J. Bryan, by his counsel, gives notice of appeal, and hereby does appeal, to the Supreme Court of the United States from the judgment of the supreme court of the Territory of Arizona rendered against said appellant on the 29th day of September, A. D. 1892, and prayed that said appeal be allowed; which appeal was then and there allowed by said supreme court of the Territory of Arizona.

73 In the Supreme Court of the Territory of Arizona.

T. J. BRYAN, Plaintiff and Appellant,
vs.
GEORGE T. BRASIUS, HENRY W. RYDER, JOHN W. JEFFRIES, James McCarthy, George Loring, and John Bacon, Defendants and Appellees. (No. 325.)

The above-named plaintiff and appellant, conceiving himself aggrieved by the final judgment, order, and decree entered by the supreme court of the Territory of Arizona on the twenty-ninth day of September, A. D. 1892, in the above-entitled action, in which the judgment of the district court of the second (now third) judicial district of Arizona in and for the county of Maricopa was affirmed and in which said appellees were adjudged to recover of the appellant their costs, taxed at — ($—) dollars (which district-court judgment was that *that* plaintiff on his complaint to recover possession of the northeast quarter of section five, township one north, of range three east, Gila and Salt River meridian, Maricopa county, Arizona, take nothing by his action, and that said defendants do have and recover of and from said plaintiff their costs and disbursements herein, taxed at the sum of ninety-two and thirty-five one-hundredths dollars) does hereby appeal from such judgment of the

supreme court of the Territory of Arizona to the Supreme Court of the United States and pray- that this *their* appeal may be allowed, and that a transcript of the record, proceedings, judgment, decision, and opinion in this cause be duly authenticated and sent to the Supreme Court of the United States.

T. J. BRYAN, *In Person.*
GOODRICH AND STREET,
Att'ys for Plaintiff & Appellant.

74 And now, to wit, on the thirteenth day of October, A. D. 1892, the appeal prayed for in the foregoing petition is hereby allowed, with citation to issue on filing a bond in the penal sum of five hundred dollars, with two good and sufficient sureties approved by the chief justice of the supreme court of the Territory of Arizona or any associate justice thereof.

HENRY C. GOODING,
Chief Justice of the Supreme Court of Arizona.

75 In the Supreme Court of the Territory of Arizona.

T. J. BRYAN, Plaintiff & Appellant,
vs.
GEORGE T. BRASIUS, HENRY W. RYDER, JOHN W. JEFFRIES, James McCarthy, George Loring, and John Bacon, Defendants & Appellees. } No. 325.

Affidavit of Value.

TERRITORY OF ARIZONA, *County of Maricopa,* } *ss:*

T. J. Bryan, being duly sworn, says that he is the plaintiff in the district court and appellant herein; that he is acquainted with the value of the property in dispute and amount in controversy in this case described in the complaint, and that the value of said property is over five thousand dollars and is of the value of fifty thousand ($50,000.00) dollars, and that the value of the amount in controversy in this cause, exclusive of costs, is over five thousand dollars and is of the value of fifty thousand ($50,000) dollars.

Affiant says that he is not aware that the record in said cause shows the value of such property in said controversy, and that this affidavit is made for the purpose of truly showing the value thereof to be above five thousand dollars, exclusive of costs, and for the purpose of perfecting an appeal of said cause to the Supreme Court of the United States and of showing said court that they have jurisdiction of said cause on appeal so far as the value of the property or the amount in controversy is concerned.

T. J. BRYAN.

76 Subscribed and sworn to before me this 12th day of October, A. D. 1892.

[SEAL.] T. D. HAMMOND,
Clerk of Supreme Court.

77 In the Supreme Court of the United States.

T. J. BRYAN, Plaintiff and Appellant,
vs.
GEORGE T. BRASIUS, HENRY W. RYDER, JOHN W. JEFFRIES, JAMES McCARTHY, GEORGE LORING, and JOHN BACON, Defendants and Appellees. } (No. 325.)

THE UNITED STATES OF AMERICA, *ss:*

To George T. Brasius, Henry W. *Henry W.* Ryder, John W. Jeffries, James McCarthy, George Loring, and John Bacon:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the third Monday of a term thereof commencing on the second Monday of October, A. D. 1892, pursuant to and in answer to an appeal allowed by the supreme court of the Territory of Arizona, as shown by the record of said court, in open court, at the term thereof at which the judgment appealed from was rendered, to wit, on the first day of October, A. D. 1892, and again allowed on the thirteenth day of October, A. D. 1892, by the chief justice of the supreme court of the Territory of Arizona from a judgment by the supreme court of the Territory of Arizona entered therein on the twenty-ninth day of September, A. D. 1892, and less than thirty days before the first day of the said term of said Supreme Court of the United States, in favor of yourselves, George T. Brasius, Henry W. Ryder, John W. Jeffries, James McCarthy, George Loring, and John Bacon, and against T. J. Bryan, affirming the judgment theretofore rendered by the district court of the second (now third) judicial district of Arizona (which district-court judgment was that plaintiff, on his complaint to recover possession of the northeast quarter of
78 section five, township one north, of range three east, Gila and Salt River meridian, Maricopa county, Arizona, take nothing by his action, and that said defendants do have and recover of and from said plaintiff their costs and disbursements herein, taxed at the sum of ninety-two and thirty-five one-hundredths dollars), and to show cause, if there be any, why the said judgment rendered against the appellant and in your favor should not be reversed, set aside, and corrected and why judgment should not be rendered for the appellant and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this thirteenth day of October, in the year of our Lord one thousand eight hundred and ninety-two.

HENRY C. GOODING,
Chief Justice of the Supreme Court of the Territory of Arizona.

79 TERRITORY OF ARIZONA, *County of Maricopa,* } *ss:*

This is to certify that *we*, the attorneys of record for said George T. Brasius, Henry W. Ryder, John W. Jeffries, James McCarthy,

George Loring, and John Bacon, appellees mentioned in the above citation, hereby admit and accept service of the above citation and acknowledge receipt of certified copy of the same at Phœnix, Arizona, the fourteenth day of October, A. D. 1892.

CLARK CHURCHILL,
Attorney for Appellees.

80 In the Supreme Court of the United States.

T. J. BRYAN, Plaintiff and Appellant,
vs.
GEORGE T. BRASIUS, HENRY W. RYDER, JOHN W. Jeffries, James McCarthy, George Loring, and John Bacon, Defendants and Appellees. } (No. 325.)

Know all men by these presents that we, T. J. Bryan, as principal and appellant herein, and C. H. Gray and W. T. Smith, both of Maricopa county and Territory of Arizona, being sureties for said principal, are held and firmly bound unto George T. Brasius, Henry W. Ryder, John W. Jeffries, James McCarthy, George Loring, and John Bacon, the appellees herein, in the sum of five hundred ($500.00) dollars, to be paid to them, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this thirteenth day of October, A. D. 1892.

81 Whereas the above-named appellant, T. J. Bryan, has obtained an allowance of appeal, and has taken and prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered and entered against him in favor of George T. Brasius, Henry W. Ryder, John W. Jeffries, James McCarthy, George Loring, and John Bacon, the appellees herein, in the supreme court of the Territory of Arizona, on the twenty-ninth day of September, A. D. 1892, in an action then and there pending between them:

Now, the conditions of this obligation are such that if the above-named appellant shall prosecute his appeal to effect and shall answer all damages and costs if he fail to make his plea good, then this obligation to be void; otherwise to remain in full force and virtue.

Sealed with our seals and dated this thirteenth day of October, A. D. 1892.

T. J. BRYAN. [SEAL.]
C. H. GRAY. [SEAL.]
W. T. SMITH. [SEAL.]

Sealed and delivered in presence of—

WEBSTER STREET.

82 TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

On this thirteenth day of October, 1892, before me personally came T. J. Bryan, C. H. Gray, and W. T. Smith, known to me to be the same persons described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same for the purpose and consideration therein expressed.

Given under my hand and seal of office this thirteenth day of October, 1892.

[SEAL.] T. D. HAMMOND,
Clerk of Supreme Court, Territory of Arizona.

TERRITORY OF ARIZONA, } ss:
County of Maricopa, }

C. H. Gray and W. T. Smith, the sureties, being duly sworn, depose and say, each for himself, that he is a resident of Maricopa county, Arizona, and that he is worth double the sum of five hundred ($500.00) dollars over and above all his debts and liabilities, exclusive of property exempt from execution.

C. H. GRAY.
W. T. SMITH.

Subscribed and sworn to before me this 20th day of October, A. D. 1892.

[SEAL.] T. D. HAMMOND,
Clerk of Supreme Court, Territory of Arizona.

I hereby approve the above bond and the sufficiency of the sureties thereto.

HENRY C. GOODING,
Chief Justice of the Supreme Court of Arizona.

83 In the Supreme Court of the United States.

T. J. BRYAN, Plaintiff and Appellant,
vs.
GEORGE T. BRASIUS, HENRY W. RYDER, JOHN W. JEFFRIES, James McCarthy, George Loring, and John Bacon, Defendants and Appellees. } No. 325.

Appellant's Assignment of Errors to the Supreme Court of the United States.

Comes now the appellant and assigns as error as follows, to wit:

The supreme court of the Territory of Arizona, sitting as a court of appeal and reviewing the proceedings of the district court, erred

in not finding that the district court erred on the trial of the cause—

First. In allowing as evidence the mortgage given by J. M. Bryan to M. W. Kales, bearing date the 23rd day of February, 1883, and the promissory note set out in the mortgage, as appears in plaintiff's first bill of exceptions.

Second. In allowing as evidence the entire judgment-roll in district court No. 325, as set out in plaintiff's second bill of exceptions.

Third. In allowing as evidence the certificate of sale of the premises by the sheriff and the assignment of that certificate to
84 J. T. Sims, as appears in plaintiff's third bill of exceptions.

Fourth. In allowing as evidence the deed from Sheriff Orme to J. T. Sims, as appears in plaintiff's fourth bill of exceptions.

Fifth. In allowing as evidence the deed from J. T. Sims and Hannah T. Sims, his wife, to George T. Brasius, as appears in plaintiff's fifth bill of exceptions.

Sixth. In allowing defendants' witness, Kales, to testify that the note and money secured by the mortgage had never been paid, as appears in plaintiff's sixth bill of exceptions; in allowing defendant- to show by the witness the value of the land at the time of the purchase by Sims, as appears in plaintiff's seventh bill of exceptions.

Seventh. In allowing as evidence the sheriff's return — the order of sale, as appears in plaintiff's eighth bill of exceptions.

Eighth. In overruling plaintiff's general demurrer and special demurrer and allowing the amended answer filed by the defendant- to stand, as appears in plaintiff's ninth bill of exceptions, and in overruling the demurrer to the answer filed May 10th, 1890.

Ninth. In overruling plaintiff's motion for a new trial and in holding that the errors alleged to have been committed by the court, as specified in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 in plaintiff's bill of exceptions, to the overruling of his motion for a new trial were not errors sufficient to grant a new trial, either collectively or singly.

Tenth. The supreme court erred in not finding the district court erred in rendering judgment for defendants instead of for the plaintiff upon the whole evidence, and for that the judgment is contrary to the law and the facts and is unsupported by the facts and evidence.

Eleventh. The supreme court erred in not finding that the district court erred in not rendering judgment for the plaintiff instead of for the defendant- under the whole evidence and the facts
85 found; that the whole evidence and facts found show that under the law the plaintiff was the owner and entitled to the land in dispute, and was entitled to the possession of it and had been ousted therefrom by defendants, and that defendants were in posses-

sion against plaintiff's right to possession; that the judgment and certificate of sale from the sheriff and the sheriff's deed and all subsequent deeds founded thereon by which defendants got into possession were void and gave defendants no right or title to the possession of any part of said premises.

Twelfth. The supreme court erred in not reversing the judgment of the district court.

Thirteenth. The supreme court — in affirming the judgment of the district court.

Fourteenth. The supreme court — in not rendering judgment for the plaintiff and appellant and in holding that the plaintiff could not recover in this action the property sued for.

GOODRICH AND STREET,
Attorneys for Appellant.

86 *Prayer for Reversal.*

Wherefore appellant prays:

First. That the judgment of the supreme court of Arizona affirming the judgment of the district court be set aside and reversed.

Second. That the Supreme Court of the United States render judgment as the supreme court of Arizona should have rendered and as the district court should have rendered, and that they adjudge that this plaintiff and appellant have judgment against the defendants and appellees for the possession of the premises in dispute.

Third. If the Supreme Court shall not proceed to render judgment, then that plaintiff and appellant have a new trial.

GOODRICH AND STREET,
Attorneys for Appellant.

87 SUPREME COURT, }
Territory of Arizona, } ss:

I, T. D. Hammond, clerk of the supreme court of the Territory of Arizona, do hereby certify that the foregoing printed and written pages, numbered from 1 to —, inclusive, are a true and correct transcript of the record and proceedings in the cause Thomas J. Bryan *vs.* George T. Brasius, Henry W. Ryder, John W. Jeffries, James McCarthy, George Loring, and John Bacon, as the same appears of record and on file in my office, including—

The transcript on appeal from the district court of the second judicial district of Arizona in and for Maricopa county to the supreme court of Arizona.

The entries and judgment of said supreme court affirming the judgment of said district court.

The opinion of the judges in affirming said judgment and the proceedings on appeal from the judgment of the supreme court of Arizona to the Supreme Court of the United States, including—

Notice of appeal in open court.

Petition for allowance of appeal.

Oath as to value of property.
Bond on appeal.
Citation to defendants and service of same.
Statement of facts.
Assignment of errors.
Prayer of reversal.

Seal Supreme Court of Arizona.

Witness my hand and seal of said court this 22nd day of November, A. D. 1892.

T. D. HAMMOND,
Clerk of the Supreme Court of Arizona.

Endorsed on cover: Case No. 15,228. Arizona Territory supreme court. Term No., 490. T. J. Bryan, appellant, *vs.* George T. Brasius, Henry W. Ryder, John W. Jeffries, James McCarthy, George Loring, and John Bacon. Filed December 8th, 1892.

Supreme Court of the United States

OCTOBER TERM, 1895.

T. J. BRYAN,
PLAINTIFF AND APPELLANT,
vs.
M. W. KALES,
DEFENDANT AND APPELLEE. } No. 198.

T. J. BRYAN,
PLAINTIFF AND APPELLANT,
vs.
D. H. PINNEY ET AL.,
DEFENDANTS AND APPELLEES. } No. 199.

T. J. BRYAN,
PLAINTIFF AND APPELLANT,
vs.
GEORGE T. BRASSIUS ET AL.,
DEFENDANTS AND APPELLEES. } No. 200.

ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLANT.

WM. A. McKENNEY,
WEBSTER STREET,
BEN GOODRICH,
Attorneys for Plaintiff and Appellant.

Law Reporter Print.

Supreme Court of the United States

OCTOBER TERM, 1895.

T. J. BRYAN, PLAINTIFF AND APPELLANT, *vs.* M. W. KALES, DEFENDANT AND APPELLEE.	No. 198.
T. J. BRYAN, PLAINTIFF AND APPELLANT, *vs.* D. H. PINNEY ET AL., DEFENDANTS AND APPELLEES.	No. 199.
T. J. BRYAN, PLAINTIFF AND APPELLANT, *vs.* GEORGE T. BRASSIUS ET AL., DEFENDANTS AND APPELLEES.	No. 200.

ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLANT.

The above actions are all precisely of the same character. The pleadings, proofs, rulings of the court and statement or findings of facts in each are similar, and the questions presented for determination to this court on the records of

each are the same. A statement of the case in one is practically a statement of each, except that the case of Bryan *vs.* Kales, No. 198, presents one question not presented in the other two, which will be noticed further on. Of course, the lands described in the several complaints are different, and the judgments of foreclosure in the cases. Kales *vs.* Kales, Administrator, upon which defendants rely for their title, are upon different lands and for different amounts.

The following is a statement of Case No. 200:

This is an action in ejectment brought by plaintiff and appellant against the defendants and appellees, to recover possession of the N. E. ¼ Sec. 5, Township 1 N., R. 3 E., Gila and Salt River Meridian. In addition to the ordinary allegations contained in complaints in ejectment, plaintiff by amendment alleges that he claims the premises described in his original complaint, by deed through Vina Brown, formerly Vina Bryan. That said Vina Brown is, and was the surviving widow of J. M. Bryan, deceased. That said J. M. Bryan died intestate on the 29th day of August, 1883, without issue; that the property in controversy in this action was acquired by onerous title during the marriage of said Vina Bryan, now Vina Brown, and the deceased; that letters of administration on said J. M. Bryan's estate were granted to M. W. Kales on or about September 24, 1883. That said estate was fully administered upon, the administration closed and the administrator discharged from his trust December 6, 1884. (Tr., p. 3.) The action was filed July 11, 1887. (Tr., p. 28.)

Defendant's original answer was filed October 22, 1887, (Tr., p. 16), and is divided into paragraphs called defenses, ranging from 1 to 8 inclusive. (Tr., pp. 3 to 9.)

To these several defenses or paragraphs plaintiff demurred *seriatim*, except to the eighth, to which no demurrer was in- ing wife and heir at law of J. M. Bryan, deceased. That

terposed. (Tr., pp. 9 to 11 and 4 to 15.) The court sustained plaintiff's demurrers to the first, second, fourth and fifth defenses or paragraphs of defendant's original answer, and overruled the demurrers to the third, sixth and seventh paragraphs or defenses of defendant's said original answer. (Tr., pp. 15 and 16.) The plaintiff excepted to the action of the court overruling his demurrers to paragraphs 3, 6 and 7 of said answers (see Tr., pp. 16 to 20), and have assigned such ruling as error.

The demurrers to paragraphs 1, 2, 4 and 5 of defendants answers having been sustained, these portions may be considered as out of the case and will not be further noticed except as to the statement of facts therein contained. The original answer, then, with these portions omitted, is in substance:

Third defense. That plaintiff is estopped from asserting title to the land sued for, by or through a conveyance under Vina Brown, because, on October 16, 1883, the District Court of Maricopa County, in an action wherein M. W. Kales was plaintiff, and M. W. Kales, administrator of the estate of J. M. Bryan, deceased, the husband intestate of said Vina Brown, was defendant, had rendered a decree ordering and adjudging that the land in controversy in this action be sold at sheriff's sale to satisfy certain sums which were part of the debts of J. M. Bryan's estate, and permitting the parties to said action to become the purchasers at said sale; that thereafter, on or about December 13, 1883, said lands were sold by the sheriff of Maricopa County by virtue of said judgment; that they were not redeemed from said sale, and that about June 16, 1884, said sheriff conveyed all the estate, title and interest of the estate of J. M. Bryan, deceased, to J. T. Sims, who became the purchaser under the sale; that plaintiff had no title or interest in said land except such as he derived by deed from Vina Brown in June, 1887, and that she never had any, except such as vested in her as surviv-

said Sims purchased and entered into possession thereof in January, 1884, and commenced to improve, and continued to improve same from thence until about February, 1887, when, by reason of said improvements, it having increased in value, said Sims and his wife conveyed it along with other lands to defendant, George T. Brassius, for $59,000, who thereupon entered into possession and had it surveyed and divided up into blocks, lots, streets and alleys, as and for town lots, and publicly advertised the same for sale, and sold to divers and sundry persons nearly all the lots in said tract, before the commencement of this action. That among others who purchased lots in said tract were Myra K. Olds and George Tantau. That thereafter in June, 1887, plaintiff's grantor, Vina Bryan, known as Vina Brown, purchased the same lots from Myra K. Olds and George Tantau that they had previously bought from defendant Brassius, and according to defendant's information and belief paid for them $1,800. That plaintiff's grantor, Vina Bryan, or Brown, knew of the sale by Sims and wife to Brassius, and of the latter's entry into the possession thereof and of his survey and subdivision thereof into lots, blocks, streets, etc., and of his advertising said lots for sale, and the sale thereof; and that she made no objection thereto, but acquiesced therein.

Sixth defense. That about June 13, 1884, one M. W. Kales owned, or pretended to own, the certificate of sale of said land issued by L. H. Orme, the sheriff of Maricopa County, free from all incumbrances, and was then in the actual possession thereof; that said Sims believing such to be the fact, purchased said certificate from said Kales at the price of $3,500 cash, paid, who thereupon by written assignment transferred same to him on that day; that about June 16, 1884, said sheriff pursuant to said certificate and in consideration of the sum bid by Kales and paid by Sims, executed to Sims a deed for all the right, title and interest in said land which J. M. Bryan owned on February 23, 1883, the date of a certain mortgage executed by J. M. Bryan in

his lifetime to Kales, or which he or his estate acquired thereafter; that Sims thereafter took possession, expended large sums of money in improving same, and continued in possession until about February 28, 1887; that Sims neither before nor at the time he purchased the certificate of sale from Kales, nor when he took the sheriff's deed and paid the purchase money, had any notice, express or implied; that the plaintiff in the suit to foreclose the mortgage in the action of M. W. Kales *vs.* M W. Kales, administrator of the estate of J. M. Bryan, deceased, was the same identical person, or that said M. W. Kales, the purchaser of said property at the sheriff's sale, was the identical person who was the administrator of said J. M. Bryan's estate, or that there was any defect in the parties or proceedings in said action; that on February 28, 1887, said T. J. Sims, with his wife were, or pretended to be owners in fee of said land free from all incumbrances, and were in actual possession thereof.

That defendant Brassius believing such to be the fact, on that day purchased that, with certain other lands, for $59,000 from said Sims, and took the deed of Sims and wife for same, and actually paid the purchase money therefor. That defendants had not, at or before the date of said deed or the payment of the purchase money for said land, any notice whatever, express or implied, that the plaintiff in the action of M. W. Kales *vs.* M. W. Kales, administrator of the estate of J. M. Bryan, deceased, to forclose the mortgage, was the identical person named as defendant in said action, or that the said M. W. Kales, the purchaser at the sheriff's sale of said property, was the same identical person who was administrator of the estate of J. M. Bryan, deceased, or that there was any defect in the parties or proceedings in said action.

Seventh defense. Is a mere denial that plaintiff was on June 29, 1887, or at any other time, the owner of the fee of any other estate in the land in controversy, or was then, or since, or at any other time, entitled to the possession thereof;

denies ouster, and that plaintiff was ever in possession, or that defendants unlawfully withheld possession.

Eighth defense. By way of cross complaint, defendants aver in substance that defendants and others who purchased from defendant Brassius, are the owners in possession and entitled to the possession of said land, and for more than five years last past they and their grantors in interest have been such owners, in the actual, open, notorious possession. That plaintiff claims and asserts an interest adverse to defendants; that plaintiff is without any right or title thereto, and that his claim is a cloud on their title (Tr., p. 8).

The defendants, by an amendment, allege in substance the following in addition to what is alleged in their original answer (Tr., p. 11 et seq.).

That plaintiff ought not to recover, because that on February 23, 1883, one J. M. Bryan borrowed of one M. W. Kales $2,500, for which he executed and delivered to Kales his promissory note, payable February 23, 1884, with interest at 1½ per cent. per month from date until paid. That on February 23, 1883, said Bryan, to secure said note, executed, acknowledged and delivered to Kales a mortgage on said land, which was duly recorded on the same day in the Recorder's office of Maricopa County. That on or about August 29, 1883, said J. M. Bryan died intestate in Maricopa County. That on September 24, 1883, said Kales was appointed administrator of said J. M. Bryan's estate, qualified as such, and entered upon the discharge of his duties as administrator of said estate. That the interest on said note and mortgage was paid by said J. M. Bryan down to May 23, 1883, but that nothing more was paid thereon. That it was provided in said mortgage that in case default should be made in the payment of the principal or interest of said note, as therein provided, then that said note should become due immediately, and said Kales, his executors, administrators or assigns, were empowered to sell said land. That by the terms of said note the interest was payable every three

months. That on August 28, 1883, more than three months' interest had become due which had not been paid. That on the —— day of ———, 1883, said M. W. Kales, the mortgagee in said mortgage, commenced an action in the District Court of the Second Judicial District of Arizona Territory, in and for Maricopa County, as plaintiff against M. W. Kales, the administrator of the estate of J. M. Bryan, deceased, as defendant, for the foreclosure of said mortgage; that on or about October 16, 1883, a judgment was rendered in said action by said court, ordering, adjudging and decreeing that said mortgage be foreclosed and said land be sold in satisfaction of said mortgage. That thereafter said land was sold by the sheriff of Maricopa County, under and pursuant to said judgment, and that at such sale said Kales became the purchaser in good faith; that he paid therefor $2,975, which was the then full market value thereof, and that said J. M. Bryan's estate received and had the use and benefit of said sum, and still has it. That, thereafter, on or about June 13, 1884, said Kales sold and assigned by a written instrument, the certificate of sale of said land, which he received from said sheriff, to one J. T. Sims for $3,500, which was actually paid to him in good faith by said Sims on that date. That on or about June 16, 1884, said sheriff, pursuant to said sale and in consideration of said sum of $3,500, and the sum of money so bid and paid by said Kales at said sale, executed and delivered to said Sims his deed whereby he conveyed to said Sims absolutely all the right, title and interest which said J. M. Bryan had at the date of the execution of said mortgage by him to said Kales, to wit, February 23, 1883, or which he or his estate acquired thereafter of, in and to said land; that thereby the said J. T. Sims became the purchaser thereof in good faith and for a valuable consideration; that said Sims, immediately after making said purchase, took and held possession thereof until February 28, 1887, when he and his wife conveyed same to defendant George T. Brassius, who then and thereby

became the purchaser in good faith; that on said day said Brassius took possession, and that he and his grantees have ever since then held, and now hold and occupy the same. That since June 16, 1884, said Sims, while he was in posession, and said Brassius, since he went into possession, and the other defendants herein, who are each of them purchasers of portions of said land from said Brassius, as hereinbefore set out, in good faith and for valuable consideration, have each severally and in good faith expended large sums of money in paying assessments and taxes on said land, and in making improvements thereon, amounting to upwards of $7,000; that neither the principal nor interest in said mortgage has ever been paid by the estate of said J. M. Bryan, deceased, nor by plaintiff or his grantor, nor by anyone else, nor has the same or any part thereof been tendered defendants or either of them.

For further answer to said complaint, defendants plead not guilty. The answers of the defendants in Nos. 198 and 199 are practically the same, except that the mortgages foreclosed in the suits of Kales *vs.* Kales, administrator, mentioned therein, were for different sums, and secured by different lands.

Transcript in No. 198, pp. 3, 4, 5, 9, 10.
Transcript in No. 199, pp. 3, 4, 5, 7, 8, 9, 10.

To defendants' amended answer, plaintiff filed general and special exceptions, which were by the court overruled, and plaintiff excepted. Ninth bill of exceptions, Tr., p. 20.

The case was tried by the court without a jury.

The plaintiff introduced testimony showing the following facts: That at the time J. M. Bryan, deceased, whose vendors were the common source of title of both plaintiff and defendant, acquired the title to the property in dispute, he was married to Vina Bryan; that said J. M. Bryan died on August 29, 1883, without children, and left Vina Bryan his

surviving widow and sole heir; that on September 13, 1883, defendant, M. W. Kales, applied to the probate court of Maricopa County, Arizona, wherein said Bryan resided at the time of his death, and where his estate was situated, for letters of administration upon said J. M. Bryan's estate; and that such proceedings were had thereon as resulted in his appointment as administrator on September 24, 1883; and that said Kales continued to be such administrator until December 6, 1884, when the administration was settled and closed, and he was discharged from his trust as such administrator. That the property in dispute was not distributed by any such probate proceedings or by the administrator, Kales, in the administration of such estate.

That afterwards the said Vina Bryan, the widow of said J. M. Bryan, deceased, married one R. D. Brown; that on June 28, 1887, the said Vina Bryan, in her then name of Vina Brown, conveyed to plaintiff by deed of conveyance, granting, conveying, remising, releasing, and forever quitclaiming, in consideration of one dollar, the property sued for, which deed was duly acknowledged and recorded in the proper record books of Maricopa County.

It was admitted that M. W. Kales, the plaintiff in the foreclosure suits, is the same person as M. W. Kales, the administrator of J. M. Bryan, deceased, the defendant in said foreclosure suit.

The plaintiff here rested.

The defendant then offered in evidence the notes and mortgages given by J. M. Bryan in his lifetime to M. W. Kales, the judgment roll with the papers in the case of M. W. Kales *vs.* M. W. Kales, administrator of the estate of J. M. Bryan, deceased, foreclosing the said notes and mortgages. The orders of sale issued upon said judgments, with the sheriff's returns thereon, the certificates of sale from the sheriff to said Kales, and the purchasers at said sheriff's sale, the assignments of said certificates by said Kales to the

holders under him, the sheriff's deeds made to the holders of the certificates, pursuant to the sale made by the sheriff, and mesne conveyances of the property to the defendants in the action (Tr., pp. 27 to 31 inc.), to which offer the plaintiffs objected on the ground that the notes and mortgages offered did not tend to show title to the land in controversy in defendant, because barred by the Statutes of Limitations on their faces, and because they showed on their faces that they had been satisfied, and because the judgment rolls showed that M. W. Kales was both plaintiff and defendant in the suits to foreclose the various mortgages, and especially so when taken in connection with other proofs introduced by plaintiff that plaintiff in said foreclosure suits was the same person, and because there was no denial that he was the same person, because said judgment was void on its face, for the reason that Kales was both plaintiff and defendant in the same action.

The District Court overruled plaintiff's objections, and he duly excepted.

The defendant's then introduced M. W. Kales, and among other things asked him whether the note and money secured by the mortgages had ever been paid. The plaintiff objected on the ground that such testimony was inadmissible under the pleadings, and because the notes and mortgages had been merged into judgments, as shown by defendant's pleading, and because defendant did not claim under the mortgages, but under the judgments into which they had been merged.

Plaintiff's objections were overruled, and he duly excepted.

Defendants then offered to prove by witnesses Kemper, Wormser, and Montgomery the value of the property at the time of the purchase, to which plaintiff objected because immaterial and irrelevant under the pleadings, and not admissible as against plaintiff's title.

The objection was overruled, and plaintiff excepted.

Transcript in No. 198, pp. 11 to 14.
Transcript in No. 199, pp. 14 to 18.
Transcript in No. 200, pp. 17 to 20.

It was admitted that defendants were in possession when the actions were commenced; that the notes and mortgages given by J. M. Bryan, in his lifetime, to M. W. Kales, and the same sued on in the causes of M. W. Kales *vs.* M. W. Kales, administrator, had not been paid, unless under the foreclosure proceedings in those cases. That, immediately after the purchase, the purchaser entered into the possession, and that he and his successors in title have continued to and still hold possession, have paid taxes and made valuable improvements, without notice of the claim of plaintiff or his grantor, except such as was imparted by the records, and that none of the defendants, except defendant Kales, had notice that M. W. Kales, their grantor, was the same person who was adminstrator of J. M. Bryan's estate, except such notice as was imparted by the records; that the property brought its market value at the sheriff's sale.

Transcript in No. 198, pp. 19 to 23.
Transcript in No. 199, pp. 25 to 30.
Transcript in No. 200, pp. 27 to 31.

The defendants then rested. The cause was submitted to the court, taken under advisement, and subsequently judgment was rendered for the defendants in each of the three cases.

Within the time prescribed by law, plaintiff filed his motion for a new trial, which was denied by the District Court, to which ruling plaintiff excepted, and appealed to the Supreme Court of the Territory.

On appeal to the Supreme Court of the Territory, the judgments of the lower court were affirmed, and the case is now before this court for review.

The Supreme Court of the Territory of Arizona adopted the findings of fact as found by the judge of the District Court.

Transcript in No. 198, p. 27.
Transcript in No. 199, p. 35.
Transcript in No. 200, p. 36.

The findings of fact are as follows:

That at the time J. M. Bryan, deceased, acquired title to the property sold under the forclosure suits, and the same in controversy, he, said Bryan, was a married man and was married to Vina Bryan; that afterwards, on August 29, 1883, said J. M. Bryan died without children, and left as his sole heir the said wife, Vina Bryan, his widow; that afterwards, on September 13, 1883, defendant M. W. Kales applied for letters of administration in the Probate Court of Maricopa County, Arizona, wherein said Bryan resided at the time of his death, and where his estate was situated; and that such proceedings were had thereon that said Kales was appointed and became the administrator of said estate on September 24, 1883, and continued as such until the administration was closed on December 6, 1884; that on the last mentioned date the administration of said estate was settled and closed, and the administrator discharged; that none of the property in controversy was distributed by any probate proceedings by the said administrator, Kales, in the administration of said estate.

That afterwards Vina Bryan, the widow of J. M. Bryan, deceased, married R. D. Brown. That on June 28, 1887, Vina Bryan, in her then name of Vina Brown, for the consideration of one dollar, conveyed to plaintiff by deeds of conveyance, granting, conveying, remising, releasing, and forever quitclaiming the property in controversy, which deeds were duly acknowledged and recorded in Maricopa County records. That the vendors of J. M. Bryan, deceased, are a common source of title for both plaintiff and defend-

ants. That said Bryan, during his lifetime, and while still married to Vina Bryan, executed and delivered certain promissory notes to M. W. Kales for various sums, and to secure the same executed to said Kales the mortgages described in the foreclosure suits; that said M. W. Kales, while he was administrator of said J. M. Bryan's estate, and the owner of the notes and mortgages, brought actions in the District Court of Maricopa County, in which he, M. W. Kales, as plaintiff, sued himself, M. W. Kales, as administrator of the estate of said J. M. Bryan, deceased, in which action he prayed for judgment upon the notes and the foreclosure of the mortgages and the sale of the premises mortgaged; that a summons was duly issued out of said court in one case on October 3, 1883, and in the other two on October 5, 1883, and served on M. W. Kales, administrator, on the same day issued; and that on October 6, 1883, the said Kales, as administrator, made answer and admitted each and every allegation of his own complaints, and consented that judgment be entered in accordance with the prayer thereof.

That said causes came on for trial, and on October 16, 1883, said court rendered judgment in each of the cases against said M. W. Kales, administrator of the estate of J. M. Bryan, deceased, in favor of M. W. Kales, plaintiff, for the sum demanded in said complaint, and entered decree foreclosing said mortgages, and ordered the mortgaged property to be sold; that on November 8, 1883, in two cases, and on November 10, 1883, in the other, orders of sale were issued on said judgments, and on December 15, 1883, the property was offered for sale by the sheriff, and the same was sold to said M. W. Kales, and a certificate of sale issued therefor to him, which were subsequently assigned and the holders thereof procured deeds from the sheriff thereunder; and that in June, 1884, the sheriff executed deeds to the purchasers or to the assignees of the certificates of sale issued by the sheriff. And that the defendants claim title

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That at the time J. M. Bryan, deceased, acquired title to the property sold under the foreclosure suits, and the same in controversy, he, said Bryan, was a married man and was married to Vina Bryan; that afterwards, on August 29, 1883, said J. M. Bryan died without children, and left as his sole heir the said wife, Vina Bryan, his widow; that afterwards, on September 13, 1883, defendant M. W. Kales applied for letters of administration in the Probate Court of Maricopa County, Arizona, wherein said Bryan resided at the time of his death, and where his estate was situated; and that such proceedings were had thereon that said Kales was appointed and became the administrator of said estate on September 24, 1883, and continued as such until the administration was closed on December 6, 1884; that on the last mentioned date the administration of said estate was settled and closed, and the administrator discharged; that none of the property in controversy was distributed by any probate proceedings by the said administrator, Kales, in the administration of said estate.

That afterwards Vina Bryan, the widow of J. M. Bryan, deceased, married R. D. Brown. That on June 28, 1887, Vina Bryan, in her then name of Vina Brown, for the consideration of one dollar, conveyed to plaintiff by deeds of conveyance, granting, conveying, remising, releasing, and forever quitclaiming the property in controversy, which deeds were duly acknowledged and recorded in Maricopa County records. That the vendors of J. M. Bryan, deceased, are a common source of title for both plaintiff and defend-

ants. That said Bryan, during his lifetime, and while still married to Vina Bryan, executed and delivered certain promissory notes to M. W. Kales for various sums, and to secure the same executed to said Kales the mortgages described in the foreclosure suits; that said M. W. Kales, while he was administrator of said J. M. Bryan's estate, and the owner of the notes and mortgages, brought actions in the District Court of Maricopa County, in which he, M. W. Kales, as plaintiff, sued himself, M. W. Kales, as administrator of the estate of said J. M. Bryan, deceased, in which action he prayed for judgment upon the notes and the foreclosure of the mortgages and the sale of the premises mortgaged; that a summons was duly issued out of said court in one case on October 3, 1883, and in the other two on October 5, 1883, and served on M. W. Kales, administrator, on the same day issued; and that on October 6, 1883, the said Kales, as administrator, made answer and admitted each and every allegation of his own complaints, and consented that judgment be entered in accordance with the prayer thereof.

That said causes came on for trial, and on October 16, 1883, said court rendered judgment in each of the cases against said M. W. Kales, administrator of the estate of J. M. Bryan, deceased, in favor of M. W. Kales, plaintiff, for the sum demanded in said complaint, and entered decree forclosing said mortgages, and ordered the mortgaged property to be sold; that on November 8, 1883, in two cases, and on November 10, 1883, in the other, orders of sale were issued on said judgments, and on December 15, 1883, the property was offered for sale by the sheriff, and the same was sold to said M. W. Kales, and a certificate of sale issued therefor to him, which were subsequently assigned and the holders thereof procured deeds from the sheriff thereunder; and that in June, 1884, the sheriff executed deeds to the purchasers or to the assignees of the certificates of sale issued by the sheriff. And that the defendants claim title

and right of possession to the premises by said sheriff's deed, based upon orders of sale issued out of the District Court of Maricopa County, Arizona, founded on the judgments rendered on said foreclosure proceedings. And that at the time of the purchase by the defendants, other than Kales, the purchasers had no notice that Kales, the plaintiff in the foreclosure suits, was the same person who was the administrator of J. M. Bryan, deceased, the defendant in said foreclosure suits, except such notice as was imparted by the records; and that the premises sold brought the fair market value at the time.

Transcript in No. 198, pp. 19 to 23.
Transcript in No. 199, pp. 25 to 30.
Transcript in No. 200, pp. 27 to 31.

ASSIGNMENT OF ERRORS.

Plaintiff appellant makes the following assignment of errors:

That the Supreme Court of the Territory of Arizona erred in not holding that the District Court erred on the trial of the cause in allowing as evidence the notes and mortgage executed by J. M. Bryan to M. W. Kales; the judgment roll of the District Court in the foreclosure suits of M. W. Kales *vs.* M. W. Kales as administrator of the estate of J. M. Bryan, foreclosing said mortgages the order of sale and sheriff's return thereon; the certificates of the sale of the land mentioned in the foreclosure proceedings; the assignment of the certificates; the deeds from the sheriff to the purchasers under such foreclosure sales and the subsequent conveyances based thereon, and allowing defendant's witness Kales to testify that the notes and money secured by the mortgages had never been paid, and in allowing defendants to show the value of the land at the time of the purchase, and in overruling plaintiff's demurrers to defend-

ants' answers, and in allowing the amended answers filed by defendants to stand, and in overruling demurrer to defendants' answer filed May 19, 1890.

That the Supreme Court of the Territory also erred in holding that the District Court was correct in overruling plaintiff's motion for a new trial, and in holding that the errors alleged to have been committed by the District Court, as specified in paragraphs 1 to 11 inclusive in plaintiff's bills of exception were not sufficient to grant a new trial, either collectively or singly; in holding that the District Court did not err in rendering judgment for defendants instead of for plaintiff upon the whole evidence and the facts found; and that the judgments are contrary to the law and the facts, and are unsupported by the facts and evidence; that the whole evidence and facts found show that under the law the plaintiff was the owner and entitled to the lands in dispute, and was entitled to possession of it, and had been ousted therefrom by defendants, and that defendants were in possession against plaintiff's right to possession; and in not holding that the judgments and certificates of sale from the sheriff, and the sheriff's deeds and all subsequent deeds dependent thereupon, by which defendants got into possession, were void, and gave defendants no right or title to the possession of any part of the premises; and erred in not reversing the judgment of the District Court, and in affirming the judgment of the District Court; and in not rendering judgment for the plaintiff and appellant; and in holding that the plaintiff could not recover in the action the property sued for.

I.

POINTS AND AUTHORITIES.

The defendants rely upon the foreclosure judgments in the cases of Kales *vs.* Kales, administrator, and the demurrers, general and special, challenge the sufficiency of the

defendants' answer, setting up said judgment, the sale thereunder, the sheriff's deed, &c., as a defense.

If the District Court was right in overruling the demurrers, then the evidence introduced, and to which appellant objected, would be proper.

We earnestly insist that these demurrers should have been sustained. Whether considered as an estoppel by judgment, or an estoppel *in pais*, the allegations contained therein wholly fail to state facts essential to constitute either. And first as an estoppel by judgment. The answer shows on its face that Kales the plaintiff and Kales, administrator of the estate of J. M. Bryan, deceased, in the foreclosure suits, are the same person. There can be no suit without adverse parties, and the judgment in an action where the same person is both plaintiff and defendant, is absolutely void, and cannot be the foundation of title.

II.

THE SAME PERSON CANNOT BE BOTH PLAINTIFF AND DEFENDANT IN THE SAME ACTION.

Bryan *vs.* Kales, 134 U. S. 135, and cases cited on page 136—

Graham *vs.* Harris, 5 Gill. & John. (Md.) 490.
Hall *vs.* Pratt, 5 Ohio, p. 83, and authorities cited.
Page *vs.* Patten, 5 Pet. pp. 312 to 316 inclusive, and authorities cited.
Paschall *vs.* Hailman, 4 Gil. (Ill.) 300, and citations.
Denny *vs.* Metcalf, 28 Me. 389.
Barley *vs.* Harris, 8 N. H. 233.

S. C. 29 Amer. Dec. 650, and cases cited; and particularly—

Eastman *vs.* Wright, 6 Pick. 320, and the numerous cases there cited.

Livingstone *vs.* Livingstone, 12 Am. Dec. 684, S. C. 2 Mill (So. Car.) 428, where the question of an executor suing himself is passed upon; same question in—

Pearson *vs.* Nesbitt, 1 Denver, 315.
Griffith *vs.* Chew, 11 Am. Dec. 556.
Blaisdell *vs.* Ladd, 14 N. H. 129.
Ford *vs.* Whedbee, 1 Dev. & Bat. 16.
Moffat *vs.* Van Mullinger, 2 Chitty R. 539, Sc. 2 B. & P. 124.
Trustees Meth. Church *vs.* Stewart, 27 Barb. 553.
In re Armstrong, 69 Cal. 240–241.
Brown *vs.* Mann, 71 Cal. 192.
Buchanan *vs.* Meisser, 105 Ill. 643.

S. C. 3 Am. & Eng. Corporation Cases, p. 68, where a number of cases are collected—

3 Blackstone Com. 18, and note 2, Id. 511.
Norton *vs.* Walsh, 94 Cal. 564.

Byrne *vs.* Byrne, 94 Cal., p. 576; a case where the administratrix, in her non-official capacity, sued herself as administratrix of the estate of her deceased father, prosecuted the action actively, and gave testimony for herself and against herself, as in the case of Kales *vs.* Kales, where the Supreme Court of California, quoting from Eastman *vs.* Wright, 6 Pickering, 316, says:

> "It is a first principal that, in whatever different capacities a person may act, he never can contract with himself, nor maintain an action against himself."

See also 7 Am. & Eng. Encyclopedia of Law, pp. 311, 313 and notes, where the authorities are fully collected.

We might multiply cases, but the above we think are sufficient. The phrase used by some of the courts that a person cannot sue himself at law, means nothing more than

that the law courts have not such flexibility as to enable them to adjust the respective rights and equities between plaintiffs and defendants who are interested on both sides of the same suit, as for instance where one partnership sues another, and some of the parties belong to both firms, and hence turn them over to courts of equity. This is explained in Freeman on Judgments, Sec. 158; 1 Herman on Estop., Sec. 138, and cases cited; as also in Corcoran *vs.* Chesapeake, etc., Co., 94 U. S. 741, where it is shown that a judgment to be binding must have adverse parties.

If an administrator can not allow his own claim against an estate (Compiled Laws of Ariz., 1887, Chap. 29, Sec. 145), and if his action in that matter is void (Henderson *vs.* Ayers, 23 Tex. 103), nor a sheriff enforce by levy and sale the collection of a judgment in which he has an interest (Erwin *vs.* Bowman, 51 Tex. 518), nor the president of a corporation execute a note to himself as payee (Smith *vs.* Immigration, etc. Assn., 78 Cal. 291, 293), because of his interests, nor an officer interested in a deed take the acknowledgment of the grantors of such deed, because of his interest (Brown *vs.* Moore, 38 Tex. 645), can it be possible that a court of equity will allow a man to sue himself, confess the allegations of his own complaint, become a purchaser at his own sale, and as evidence of the fact, introduce the judgment roll in the case to prove it? Suppose the notes and mortgages sued on had been forged, or that J. M. Bryan had not, in fact, been dead, but that Kales had administered on his estate while alive (as in Scott *vs.* McNeal, 154 U. S. 34), or that the same land had been sold by a former administrator (Withers *vs.* Patterson, 27 Tex. 493), a similar proceeding would have made it valid, and we would not have been permitted to attack it; or if we had, under the view of the District Court and of the Supreme Court of the Territory of Arizona, it would have been unavailable. Such is not the law.

Pray et ux. *vs.* Jenkins et al., Supreme Court of Kan., Jan. 9, 1892, reported in 28 Pacific Rep., p. 716.

But it is said by the Supreme Court of the Territory of Arizona that the court could not assume that Kales, the plaintiff in the foreclosure suits *vs.* Kales, the administrator of J. M. Bryan's estate, the defendant in those actions, is the same person.

III.

IDENTITY OF NAME IS PRIMA FACIE EVIDENCE OF IDENTITY OF PERSON.

1 Greenleaf's Evid., Sec. 575; note.
Taylor's Evidence, Sec. 1860.
Cowen & Hill's Notes to Philip on Evid. 1301, and cases cited.
Thompson *vs.* Manrow, 1 Cal. 428.
Moll *vs.* Smith, 16 Cal. 554, 555.
Garwood *vs.* Garwood, 29 Cal. 520.
Brown *vs.* Metz, 33 Ill. 343.
Gitt *vs.* Watson, 18 Mo. 274.
State *vs.* Moore, 61 Mo. 276.
Godell *vs.* Hibbard, 32 Mich. 55.
Campbell *vs.* Wallace, 46 Mich., 320 and 111.
Jackson *vs.* King, 5 Cowen, 239.
Jackson *vs.* Cody, 9 Cowen, 149, 150.

And the burden of disproving this is on the defendants. See two cases last cited.

The leading English cases on this subject are Sewell *vs.* Evans and Roden *vs.* Ryde, 45 Eng. Com. Law R. (4 Adol. & Ellis, N. S.) 625, where, after careful consideration of the full bench, the rule is laid down as above stated.

IV.

ARE THE PRESUMPTIONS IN FAVOR OF JUDGMENTS OF COURTS OF GENERAL JURISDICTION CONCLUSIVE ON THE FACTS IN THIS CASE?

It is contended, however, by the defendants, and their contention is sustained by the decision of the Supreme Court of Arizona in these cases; that the presumption in favor of judgments of courts of general jurisdiction prevails over the presumption that identity of name is sufficient evidence of identity of person.

The answer to this argument is that these presumptions in favor of judgments rendered by a court of general jurisdiction,—

> "only arise with respect to jurisdictional facts, concerning which the record is silent; that they are indulged only to supply the absence of evidence or averments respecting the facts presumed; that they have no place for consideration when the evidence is disclosed."

And it follows that there can be no presumption against a fact which the record shows.

We have endeavored to show that a court can have no jurisdiction of a case without parties, and that there are no parties when the same person is both plaintiff and defendant. Now, the fact that M. W. Kales appears as both plaintiff and defendant in the foreclosure suits under which defendants claim title is *prima facie* evidence that he was the same person. The record, then, is not silent on its face as to this jurisdictional fact, and under the authorities above quoted there is no room for the presumption in favor of the judgment. The law on this subject is laid down so plainly by Mr. Justice Field, in Galpin *vs.* Page, 18 Wallace, 366, that there ought not to be any room for doubt; to the same effect

in Herring *vs.* Chambers, 103 Pa. St. 175, and Withers *vs.* Patterson, 27 Tex. 491. If, however, this court should hold that the District Court ruled properly in overruling the demurrer and in admitting in evidence the record in the case of Kales *vs.* Kales, administrator, in the foreclosure suits, then we say that on the whole case, as shown by the findings of fact, the judgment should have been rendered for the plaintiff, because it is not only stated in the defendant's pleadings and proved on the trial, but, as the findings show, it was actually admitted as a fact on the trial that Kales the plaintiff and Kales the defendant in the foreclosure suits was the same person. In Hill *vs.* City Cab, etc., Co., 79 Cal. 188, this precise question was presented and settled. The court there held that the judgment of the court of general jurisdiction could not be collaterally assailed unless void on its face, but add—

> "But this rule is not that a judgment which is void will be enforced as if it were valid, but that it cannot be shown to be void except in certain ways. If the party, however, should admit the facts which show the judgment to be void, or if he should allow them to be established without opposition, then, as a question of law upon such facts, we do not see why the case is not like that where a judgment is void upon its face. 3. The facts, therefore (of the validity of the judgment), must be taken to be established by the record beyond all controversy, and upon such facts the law is that the judgment is void,"

and cites several cases. The court then proceeds to say:

> "The judgment sued on, being shown to be absolutely void, cannot be held to be valid, or to be a cause of action."

This means, as applied to the facts in this case, that the judgment, being shown to be void by the facts found, cannot be the basis of a defense to plaintiff's action.

We further contend that we had a right to introduce evi-

dence *aliunde* the record of the case of Kales *vs.* Kales, administrator, to show that he was the identical same person who was both plaintiff and defendant in the actions to foreclose, and that such proof does not contradict the record is settled law.

Garwood *vs.* Garwood, 29 Cal. 520, and cases there cited.
McMinn *vs.* Whelan, 27 Cal. pp. 300–314.
Mastin *vs.* Gray, 19 Kan. 458.

If we are correct in these propositions that a man cannot sue himself, and that identity of name is *prima facie* evidence of identity of person, or that the admission that Kales, and Kales, administrator, are the same, then the judgment rendered in the case of Kales *vs.* Kales, administrator, is an absolute nullity.

Jurisdiction is defined to be—

"the power to hear and determine the subject matter *between parties* to a suit."
Rhode Island *vs.* Mass., 12 Peter, 718.

And one of the essentials of its exercise is that proper parties must be before it.

Munday *vs.* Vail, 5 Vroom. (34 N. J. Law) 422.

But defendants contend, and the Supreme Court of Arizona hold, that the rule laid down in—

Garwood *vs.* Garwood, 29 Cal. 520,

that parol testimony is admissible to show that Kales, the plaintiff, and Kales, administrator, the defendant in the foreclosure suits, are the same person; and the rule laid down in—

Hill *vs.* City Cab, &c., Co., 79 Cal. 188,

that the admission that he was the same person makes the judgment void, just the same as if it appeared to be void

upon its face, is not good law; and that the proof of identity of Kales on the one hand, and the admission of his identity on the other, shall not be given any effect whatever. The argument is that, to allow any force to such proof and admissions would be in effect to allow the judgments in the foreclosure suits to be attacked collaterally.

Whether it may be considered technically as a collateral attack upon the judgment or not, we believe that the great weight of authority is that a want of jurisdiction in a court can always be shown by evidence *aliunde* the Record. Certainly such is the doctrine to be deduced from the authorities in the Federal Courts.

In Hickey *vs.* Stewart, 3 How. (U. S.) 756, and
Williamson *vs.* Berry, 8 How. (U. S.) 541,

both of which were actions in ejectment, this court, in effect, held that, where a party relies upon a judgment to support his claim he must show a valid judgment, and that it was subject to collateral attack for want of jurisdiction in the court which rendered it.

In Smith *vs.* Tupper, 43 Am. Dec. 483,

it is held that where a court has no jurisdiction its judgment may be collaterally impeached.

Same rule in—

Fitzhugh *vs.* Custer, 51 Am. Dec. 729; S. C. 4 Tex. 391.

In Elliott *vs.* Piersol, 1 Pet. 328, 340,

the court says:

> "This distinction runs through all the cases on the subject, and it proves that the jurisdiction of any court exercising authority over a subject may be inquired into in every court when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings."

In Putnam *vs.* Man, 20 Am. Dec. 686; S. C. 3 Wend. 202,

the court held that want of jurisdiction may be shown collaterally whenever benefit or protection is sought under the judgment.

In Kilbourn *vs.* Thompson, 103 U. S. 197, 198,

this court says that the tendency of modern decisions everywhere is to the doctrine that the jurisdiction of a court or other tribunal to render a judgment affecting individual rights is always open to inquiry when the judgment is relied on in any other proceeding.

In Mastin *vs.* Gray, 19 Kans. 459;
Same Case, 27th Am. Rep. 149,

the conflicting decisions of the State and Federal Courts are grouped, and that court held that the rule applied to domestic judgments as well as to judgments of a sister State, and the same doctrine was announced, and we think established by reasoning that is unanswerable in—

Ferguson *vs.* Crawford, 70 N. Y. 253.
Same Case, 26 Am. Rep. 589.

To the same effect is—

Thompson *vs.* Whitman, 18 Wall. 457, and
Reynolds *vs.* Stockton, 140 U. S. 254–273.
In White *vs.* Rosebury, 121 U. S. 519, 520,

this court held that such an attack does not call in question the regularity of a court to act, but simply shows that its authority to act never existed.

In Needham *vs.* Thoyer, 137 Mass. 536,

the court discusses the effect of the Fourteenth Amendment to the Constitution of the United States on the subject and lays down the same rule. And, as we understand the decision in

Pennoyer *vs.* Neff, 95 U. S. 732, 733,

this court holds that, since the adoption of the Fourteenth Amendment, the validity of domestic judgments may be

directly questioned, because, if the court had no jurisdiction to act, a man's property would be taken from him without due process of law. In

Latham *vs.* Edgerton, 9 Cowan, 229,

the court says—

> "But it is said that a record cannot be impeached by a pleading; that the plaintiff below either should have used the Court of Common Pleas to set aside the proceedings upon the appeal, or have brought a writ of error and alleged diminution in the bond."

But having submitted to the judgment of that court, he cannot now impeach it. The plaintiff below might have applied to the court to set aside the pleadings, but he was not bound to do so. He had a right to lie by until the decision or judgment of the court was set up against him, and then to show that the proceedings were void for want of jurisdiction. The principle that a record cannot be impeached by a pleading is not applicable to a case like this. The want of jurisdiction is a matter that may always be set up against a judgment, when sought to be enforced, or where any benefit is claimed under it. The want of jurisdiction makes it utterly void and unavailable for any purpose. And in—

Mastin *vs.* Gray, 19 Kan. 467,

the court held that, in ejectment cases, the validity of a judgment is put in issue, without pleadings specifically tendering an issue. To the same effect is—

Ferguson *vs.* Crawford, 70 N. Y. 253;
S. C., 26 Am. Rep. 601;

and certainly that would be the rule in Arizona, where, under the statute, a replication is not allowed. See—

Comp. Laws of Ariz. 1877, p. 414;
Section 2474 and page 418;
Section 2501.

In Wright *vs.* Douglas, 10 Barb. 111, it is said:

> "The want of jurisdiction may always be shown in evidence."

Doolan *vs.* Carr, 125 U. S. 618,

was an action on ejectment. Plaintiff relied on a United States patent to land, which was in every way regular.

Defendants offered extraneous evidence to show that the officer of the Land Office who issued the patent had no power or jurisdiction to do so. Plaintiff objected on the ground that patent was conclusive, and could not be collaterally attacked in a court of law, but could be by bill in equity only. The Circuit Court sustained the objection, and refused to let the testimony offered go to the jury. On appeal this court reviews a number of the earlier decisions (among them Elliott *vs.* Pierson, supra), and holds that the patent may be shown to be void, although issued with all the forms of law, by showing a want of authority in the officer to grant the same; and that extraneous, parol evidence is admissible for that purpose, and that such patent is subject at all times to inquiry whether such officer had the lawful authority to make a conveyance of the title. To the same effect—

> Iron Silver Mining Co. *vs.* Campbell, 135 U. S., particularly on pp. 294–296.
> Irwin *vs.* San Fran. Sav. Union, 136 U. S. 579.
> U. S. Land Assn. *vs.* Knight, 85 Cal. 460.
> Cucamonga Fruit-Land Co. *vs.* Moir, 83 Cal. 101.
> Mantel *vs.* Nois, Supreme Court of Montana, 5 Pac. Rep. 856.

These cases hold that the jurisdiction of the court to act, may be inquired into even in an action at law.

Now, if a patent can be attacked collaterally by parol evidence showing that the officer who issued it had no jurisdiction to grant it, why cannot a judgment be attacked in

the same way, by showing that the court which rendered it had no jurisdiction?

V.

THE DEFENDANT IN EJECTMENT CAN NEVER DEFEND HIS POSSESSION AGAINST THE PLAINTIFF, UPON A TITLE IN HIMSELF, BY WHICH HE COULD NOT RECOVER THE POSSESSION IF HE WERE OUT OF, AND THE PLAINTIFF IN POSSESSION.

Reversing the positions of the parties in this case, could defendants, if plaintiff were in possession of the lands in controversy, recover against the title of plaintiff? They certainly could not.

Hickey's Lessee *vs.* Stewart, 3 How. (U. S.) 759, 760.

Says Mr. Freeman, in his work on Executions, Vol. 1, Sec. 20:

> "A void judgment is in legal effect no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless itself, all proceedings founded upon it are equally worthless. It neither bars nor binds any one. All acts performed under it, and all claims flowing out of it, are void. The purchaser at a sale by virtue of its authority finds himself without title and without redress."

To same effect:

Pennoyer *vs.* Neff, 95 U. S. 714.
Scott *vs.* McNeal, 154 U. S. 34, 36.

If we are correct then, that Kales, in his individual capacity could not sue Kales in his capacity of administrator, and that the judgments in the foreclosure suits are void, it

necessarily follows that the estate of J. M. Bryan, deceased, was never cited to appear, never had its day in court, and its property has been confiscated without due or any process of law. That it has been so served with process must appear upon the record of the judgment.

Windsor *vs.* McVeigh, 93 U. S. 279–281.

VI.

ESTOPPEL IN PAIS.

We will now discuss said defenses as an estoppel *in pais*.

To create an estoppel *in pais* it must appear, first, that the party making the admission by his declaration or conduct was apprised of the true state of his own title; second, that he made the admission with the *express intention to deceive*, or with such careless or culpable negligence as to amount to a constructive fraud; third, *that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge;* and fourth, that he *relied directly upon such admission*, and will be injured by allowing its truth to be disproved.

Martin & Zellerbach, 38 Cal. 300.
Dean *vs.* Parker, 88 Cal. 283.
Biddle Boggs *vs.* Merced Mining Co., 14 Cal. 367 *et seq.*
Lux *vs.* Haggin, 69 Cal. 266.
Brant *vs.* Virginia Coal and Iron Mining Co., 93 U. S. 336.
Steel *vs.* Smelting Co., 106 U. S. 456.

Mere acquiescence is not sufficient; there must be "assent."

Lux *vs.* Haggin, 69 Cal. 270 *et seq.*

Silence without fraud, that is, mere silence unaccompanied

by any act calculated to mislead or deceive another to his hurt, *never estops a party to claim his own.*

Railroad Co. *vs.* Dubois, 12 Wall. 64.
Cleveland *vs.* Richardson, 132 U. S. 329.
Ferris *vs.* Coover, 10 Cal. 631.
Bales *vs.* Perry, 51 Mo. 449.
Fielding *vs.* Dubose, 63 Tex. 637.
Hill *vs.* Epley (7 Casey) 31 Pa. St. 334.
Strong *vs.* Ellsworth, 26 Vt. 367.
Sulphine *vs.* Dunbar, 55 Miss. 255.
Mason *vs.* Philbrook, 70 Me. 57.
Rice *vs.* Dewey, 54 Barb. 455.
Mayo *vs.* Cartwright, 30 Ark. 407.
Bramble *vs.* Kingsbury, 39 Ark. 131.
Neal *vs.* Gregory, 19 Fla. 356.
Terre Haute RR. *vs.* Rodel, 89 Ind. 128.
Viele *vs.* Judson, 82 N. Y. 32.
Diffenback *vs.* Vogler, 61 Md. 370.

In Stockman *vs.* Riverside L. & I. Co., 64 Cal. 59, the plaintiff stood silently by and saw defendants construct a canal at a cost of about $15,000, and maintain and use it to conduct water for irrigation with the knowledge of plaintiffs and their grantors, and without objection on their part. The court say that they knew of no case holding that these facts were sufficient to constitute an estoppel, and add:

> "There must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title, the effect of the estoppel being to forfeit his property and transfer its enjoyment to another."

In Knouff *vs.* Thompson (4 Harris), 16 Pa. St. 357, the plaintiff lived within 200 yards of the demanded premises for years, saw defendants and their grantors improving them all the time from March 2, 1829, to January 16, 1850, four-

teen years after plaintiff became of age, and but one month and sixteen days before the claim would have been barred by the statute of limitation, without notice or protest, and yet the court held that there was no estoppel, and draws the distinction between mere silence and encouragement.

In Meely *vs.* Collins, 41 Cal. 663; S C. 10 Am. Rep. 279, the defendant claimed to be an innocent purchaser, deraigning title through a forged deed, which had been of record more than five years, of which plaintiff had notice. It was urged that plaintiff was estopped because she knowingly permitted the parties to deal with the property as their own, and because she failed to sue for five years after she knew the forged deed was of record, the court held she was not estopped because she had done nothing to induce defendant to make the purchase.

In White & Tudor's Leading Cases, Notes to Bassett *vs.* Nasworthy, 4th Am. Ed. by Hare & Wal., Vol. 2, Part 1, top page 30, the rule is stated thus:

> "The distinction seems to be between participation or procurement and silence and acquiescence, the one imposing no liability unless there is willful concealment or fraud, while the other may create a bar," etc.

In the notes to the Duchess of Kingston Case, Vol. 2, Part 2, 8th Ed. of Smith's Lead. Cases, pages 890–2, the law as deduced from the authorities is substantially as follows:

> "The rule, precluding a man from claiming his own, is in a high degree penal, and ought not to be enforced if justice can be obtained without a forfeiture. The language or conduct of the owner must be the direct inducement which causes another to change his position to his injury; the silence or concealment must be fraudulent or marked with such gross negligence and indifference to the rights of others as to be equivalent to actual premeditated fraud. Good faith and diligence must concur with

> the want of them on the other, and an estoppel will not arise in the absence of actual fraud unless the purchaser was destitute not only of all actual knowledge of the true state of the title, but of the means of acquiring knowledge by a recourse to the record. When the title has once been recorded, no responsibility will arise from a failure to take further steps to warn subsequent purchasers who may fairly be presumed to have used the means pointed out by the law, and acquired all the knowledge which it is important for them to have. It is only when silence becomes a fraud that it postpones, and the difference is plain between standing by without taking measures to stop a sale or warn a purchaser, or even answering such questions as he may choose to put, and taking an active part in the transaction or inducing him to buy by advice or persuasion."

In Wood *vs.* Carpenter, 101 U. S. 142, 143, the Supreme Court say:

> "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion to prevent inquiry. There must be reasonable diligence, and the means of knowledge are the same thing in effect as knowledge itself."

It is not alleged or proved that defendants were misled by any act or word of Vina Bryan, or Brown; that they relied on anything she said or did as an inducement to make the purchase; that she made any misrepresentations of any kind or fraudulently concealed any fact, or used any artifice to throw defendants off their guard, or to entrap or deceive them in any way, nor is it alleged that the means of information as to title of the land was not equally open to them as to her.

And from defendant's pleadings it further appears that all the acts and words, which are alleged to constitute an estoppel *in pais*, as against Mrs. Bryan, or Brown, and upon her successor in title, plaintiff in this case, occurred long after

the sale was made and after the defendants went into possession of the property.

In such cases the doctrine of estoppel has no application.

Fletcher *vs.* Holmes, 25 Ind. 458.

> "A party buying or selling property . . . must by inquiry or examination gain all the knowledge he desires. He cannot proceed blindly, omitting all inquiry and examination, and then complain that the other party did not volunteer all the information he had." 132 U. S. p. 329 et. seq. 39 Ark. 131.

To make it an estoppel, Mrs. Bryan must not only have had an opportunity to speak which was not embraced, but there must have been an imperative duty to speak.

Bigelow on Estoppel, 4th Ed., p. 575.

Just how the purchase by Mrs. Brown of the lots from Mrs. Olds and Tantau works an estoppel in favor of defendants, we are unable to see.

Moore *vs.* Boyd, 74 Cal. 173.

Reynolds *vs.* Lounsbury, 6 Hill, 536.

Tested by the above cases, defendants' defenses are wholly insufficient as an estoppel *in pais*, and plaintiff's demurrer thereto should have been sustained.

VII.

DEFENDANTS ARE NOT BONA FIDE PURCHASERS.

The questions presented by the sixth defense, that defendants had no notice that Kales, plaintiff, and Kales, the administrator, defendant in the foreclosure suits was the same person, and that the same Kales was the purchaser of the property at the sheriff's sale, under the decrees of foreclosure,

and had no notice of the defect in the parties or proceedings in said suits, and which the Supreme Court of Arizona sustained as a good defense to plaintiff's complaint, is wholly untenable. The answers show that defendants' claim under that very decree; that the very same sheriff's certificate and deed which they claim constitute their title, is based upon that decree.

The law is that when a purchaser cannot make out his title but through a deed which leads to a fact, he will be affected by notice of that fact, and that that which puts the party upon inquiry is notice, and that he must look to every part of the title which is essential to its validity.

Brush *vs.* Ware, 15 Pet. 114.
See also Hardy *vs.* Harbison, 4 Sawy. 545 *et seq.*
Bank of Mendocino *vs.* Baker, 82 Cal. 117.
Hyde *vs.* Mangan, 88 Cal. 327.
Shain *vs.* Sresovich, 104 Cal. 405.

As to the effect of the recitals contained in sheriff's certificate of sale and deed, see—

Bryan *vs.* Crump, 55 Tex. 12.
Corbett *vs.* Clenny, 52 Ala. 480.
Stidman *vs.* Matthews, 29 Ark. 650.
Gress *vs.* Evans, 1 Dak. 387.
Wiseman *vs.* Hutchinson, 20 Ind. 40.

At all judicial sales the purchaser gets no better title than the officer of the law has power to sell; he exercises only a naked power. The doctrine of *caveat emptor* applies, and the purchaser is chargeable with notice whether the court had jurisdiction to pronounce the judgment or decree under which the sale was made.

Stegall *vs.* Huff, 54 Tex. 197.
Reeve *vs.* Kennedy, 43 Cal. 650.
Chambers *vs.* Jones, 72 Ill. 281.
Cleveland *vs.* Richardson, 132 U. S. 329, 330.

Had defendants looked to the record in the suit of Kales *vs.* Kales, the administrator, as they were bound to do, *common prudence* would have compelled them to inquire whether Kales was both plaintiff and defendant in that action, and the defect in the parties and proceedings therein and in the title claimed thereunder, would have been apparent.

VIII.

ARE DEFENDANTS MORTGAGEES IN POSSESSION?

Could it, by any possibility, under the allegations of the answer, be claimed that defendants are mortgagees in possession, then we say they are concluded by their own averments that they claim under the foreclosure decree; because where a party takes possession under such a decree, he cannot be regarded as a mortgagee in possession.

Davenport *vs.* Turpin, 43 Cal. 597.

But if this was not so, still plaintiff is entitled to recover.

Sec. 2698, Comp. Laws of Ariz. of 1877,

provides that a mortgagee is not entitled to possession without foreclosure and sale.

McMillan *vs.* Richards, 19 Cal. 411, 412.
Nagle *vs.* Macy, Id. 428.
Kidd *vs.* Temple, 22 Cal. 262.
Teale *vs.* Walker, 111 U. S. 251.

And if he gets possession without or against the consent of the mortgagor, he is a mere trespasser.

Witherell *vs.* Wiberg, 4 Sawy. 232.
Spect *vs.* Spect, 88 Cal. 440.

In the first case the court held that a plea stating that

defendant was in possession of mortgaged premises, but which did not allege that he entered with the mortgagor's consent, was frivolous. And this must be shown by matters independent of and collateral to the mortgage.

Semple *vs.* Bank Brit. Col., 5 Sawy. 400, 401.
Russell *vs.* Ely, 2 Black. (U. S.), 575.

See also:

Humphrey *vs.* Hurd, 29 Mich. 44.
Hazeltine *vs.* Granger, 44 Id. 505.
Malone *vs.* Roy, 40 Pac. Rep. 1040.

IX.

ARE DEFENDANTS PROTECTED BY THE STATUTES OF LIMITATION?

Defendants in the eighth defense contained in their original answer, allege possession for more than five years last past before the filing of the answer. Even if the plea is in good form, which we deny (Sharp *vs.* Daugney, 33 Cal. 511), still plaintiff should recover. The proof shows that Sims received the sheriff's deed on June 16, 1884, and entered into possession on the same day. The administration of J. M. Bryan's estate was closed and the administrator discharged December 6, 1884. (Tr., p. 28.) Under the statutes of Airzona Territory, in force at the time, neither Vina Bryan, nor her grantee, the plaintiff in this suit, could sue until the estate of Jonathan M. Bryan was closed. Section 114, Chap. 29, Compiled Laws of Arizona of 1877, p. 271, gives to the executor or administrator the right of possession of all real and personal property, and the right to receive the rents and profits of real estate nntil the estate is settled or delivered over by order of the court or probate judge. Sec. 194,

same chapter, p. 289, does the same thing, and in addition provides that the possession of the executor or administrator shall be deemed the possession of the heirs or devisees for the purpose of bringing suits to quiet title or for partition of estates; but—

> "such possession by the heirs or devisees shall be subject, however, to the possession of the executor or administrator for all other purposes."

Section 195 provides that—

> "actions for the recovery of any property, real or personal, or for the possession thereof, . . . may be maintained by and against executors or administrators in cases in which the same might have been maintaind by or against their respective testators or intestates."

These sections are copies of the same sections of the California probate acts in force in that State before the adoption of the codes, January 1, 1873, and have always been construed to prohibit heirs from maintaining suits for recovery of real estate pending administration.

Meeks *vs.* Hahn, 20 Cal. 627.
Meeks *vs.* Kirby, 47 Cal. 168.
Chapman *vs.* Hollister, 42 Cal. 463.
Meeks *vs.* Vassault, 3 Sawy. 206.
McLeran *vs.* Benton, 73 Cal. 342.

Sec. 24, Chap. 35, Comp. Laws Ariz., 1877, p. 360, provides:

> "When the commencement of an action is stayed by an injunction or statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action."

It follows, then, that the earliest period at which plaintiff or his grantor, Vina Bryan, could sue was December 6, 1884

and that only two years, seven months and seven days had elapsed after that date before suit was brought, July 11, 1887, which is long short of any period of limitations prescribed by the Arizona statute. Even if the statute began to run from the date of the sheriff's deed to Sims, the bar is incomplete, the time being only a few days over three years.

X.

ARE DEFENDANTS SUBROGATED TO THE RIGHTS OF DEFENDANT KALES, WHO PURCHASED AT THE FORECLOSURE SALES?

Defendants claim that the notes and mortgages of J. M. Bryan to Kales, not having been paid, and that they being purchasers under Kales, are subrogated to the rights of Kales as mortgagees.

If, as we trust, we have shown the judgments based on the notes and mortgages are absolute nullities, then it is obvious that the notes and mortgages were never merged into judgments, and plaintiff's demurrers to the effect that the notes and mortgages appeared upon the face of the answers to have been barred by the statute of limitations, should have been sustained. The record shows that the note and mortgage set up in No. 200 matured February 23, 1884.

The amended answer, setting them up, was filed July 7, 1890, a little over six years and four months afterwards.

Under the law in Arizona, in force then and now, the debt was and is the principal thing, and the mortgage a mere incident, and when the debt is barred the mortgage is barred.

Ewell *vs.* Daggs, 108 U. S. 147.
Lord *vs.* Morris, 18 Cal. 482.
McCarthy *vs.* White, 21 Cal. 495.

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Lord *vs.* Morris, 18 Cal. 482.
McCarthy *vs.* White, 21 Cal. 495.

AND THE POINT MAY BE PRESENTED BY DEMURRER.

Mason *vs.* Cronise, 20 Cal. 211.

But it is held by the Supreme Court of Arizona that the statute of limitations does not apply to equitable actions.

Sec. 2094, p. 358, Comp. Laws of Ariz. 1877,

is an almost literal copy of the limitation laws of California, and by it is provided that an action upon a contract, obligation or liability, founded upon an instrument of writing, like this, is barred by that section within four years. The cases of—

Lord *vs.* Morris, supra.
McCarthy *vs.* White, supra.
Boyd *vs.* Blankman, 39 Cal. 19.
Grattan *vs.* Wiggins, 23 Cal. 34.
Cunningham *vs.* Hawkins, 24 Cal. 409.
White *vs.* Sheldon, 4 Nev. 288; 20 Nev. 140.
Piller *vs.* So. Pac. Railroad Co., 52 Cal. 42.
Dore *vs.* Thornburg, 90 Cal. 67.
Lux *vs.* Haggin, 69 Cal. 269.
Hancock *vs.* Plummer, 66 Cal. 338.
Norton *vs.* Meader, 4 Sawy. 615.
Rogers *vs.* Brown, 61 Mo. 186.
Kelley *vs.* Hurt, 61 Mo., 463.
Smith *vs.* Fly, 24 Tex. 361.
Case of Broderick's Will, 21 Wall. 518, and numerous other cases,

all hold that statutes like the Arizona statute apply both to equitable and to legal actions.

The bar, then, in this case became complete within four years after maturity—at any rate, within four years after J. M. Bryan's estate was closed and the administrator discharged on December 6, 1884.

Comp. Laws of Ariz., 1877, p. 358, Sec. 2094.

If the judgment is void, defendants cannot be innocent purchasers. Besides, they did not pay the purchase money without notice, actual or constructive, of the defect in the title.

Everson *vs.* Mayhew, 65 Cal. 167, and cases cited.
Harrison *vs.* Boring, 44 Tex. 263.
Watkins *vs.* Edwards, 23 Tex. 447.
Boone *vs.* Childs, 10 Pet. 210–214.

In Arizona, an antecedent debt is not sufficient.

Leading Cases in Equity, 82, 83.
People's Savings Bank *vs.* Bates, 120 U. S. 567.

We have shown that defendants had notice by the very deed they claim under. To invoke the doctrine of subrogation, defendants would have to show:

First, that they were holders in good faith.

Second, that the judgment on which they based their claim is a valid one, and unless they do both, plaintiff does not have to refund to them in order to recover. The following authorities are decisive upon this point:

Harper *vs.* Rowe, 53 Cal. 234.
Stegall *vs.* Huff, 54 Tex. 197, and cases cited.
Hunt *vs.* Loucks, 38 Cal. 373.
Burns *vs.* Ledbetter, 54 Tex. 385.
Bishop *vs.* O'Connor, 69 Ill. 431.
Branham *vs.* Mayor, etc., 24 Cal. 586.
Guy *vs.* Du Uprey, 16 Cal. 195.
Boggs *vs.* Hargrave, 16 Cal. 560.
McCraken *vs.* City of San Francisco, Id., 628.
Etna Life Insurance Co. *vs.* Middleport, 124 U. S, commencing on page 548, where the doctrine of subrogation is carefully considered.

Sims et al., have only such rights as Kales had, and no-

more. Could Kales defend or maintain an action of ejectment in this case?

Besides Kales, and not Sims, was the purchaser at the sheriff's sale, and a man cannot be the equitable assignee of a right he already owns, and the doctrine of subrogation cannot apply.

Brown *vs.* Metz, 33 Ill. 343.

Where a third party advances the money and pays a debt, he is not subrogated, unless it is the clear intention of the parties to the transaction at the time, that he should be. Here the pleadings and proof and findings of fact all show that Sims did not intend to buy the debt, that is: the note and mortgage, but to buy the land, under the judicial sale.

Dodge *vs.* Freedman's S. & T. Co., 93 U. S. 386–7.

The judgment roll and other evidences of title depending upon it should have been excluded for another reason. On its face it shows that the note and mortgage were never authenticated and presented within ten months to and allowed or rejected by the probate judge, as required by Sections 1645 and 1662, Comp. Laws of Arizona of 1877, and Sec. 1653, Id., which provides that no claim can be sued until this is done. These sections have been held broad enough to include claims secured by mortgage.

Ellisen *vs.* Halleck, 6 Cal. 386.
Pico *vs.* De le Guerra, 18 Id. 428.
Fallon *vs.* Butler, 21 Id. 32.
Willis *vs.* Farley, 24 Id. 490.
Ellis *vs.* Polhemus, 27 Id. 350.
Pitte *vs.* Shipley, 46 Id. 160.
Marsh *vs.* Dooley, 52 Id. 232.

Estate of Taylor, 10 Cal. 482; S. C. 16 Id. 434, and if not so presented and allowed they are barred.

Estate of Taylor, supra.

These sections are the same as the California statutes, before the adoption of the Codes in 1873.

XI.

Upon the death of J. M. Bryan, deceased, without children, Mrs. Vina Bryan, or Brown, as survivor in community, became vested with the title to the property, and had a right to convey to plaintiff.

The complainant alleges, and the proof shows, that the property in controversy was acquired after the marriage of Jonathan M. Bryan and Vina Bryan, his wife, and is community property. All property acquired after marriage, by either husband or wife, except such as may be acquired by gift, bequest, devise and descent, shall be common property. See—

Compiled Laws of Arizona, 1877, p. 328, Sec. 2, Chap. 32.
Pixley *vs.* Huggins, 15 Cal, 131.
Schuler *vs.* Sav. and L. Soc., 64 Cal. 398.

Upon the death of either spouse without descendants, the whole of the common property shall go to the survivor, subject to debts of the estate.

Compiled Laws of Arizona, Chap. 32, Sec. 11, p. 329.
Broad *vs.* Broad, 40 Cal., p. 493.
De Godey *vs.* Godey, 39 Cal., p. 164.
Payne *vs.* Payne, 18 Cal. 301.
Estate of Silvey, 42 Cal., pp. 213.
Chapman *vs.* Hallis, 60 Id. 463.
Estate of Frey, 52 Cal., p. 658.
Becket *vs.* Solover, 7 Cal. 215, 229.

XII.

The difference between the case of Bryan *vs.* Kales, No. 198, and the other two cases mentioned in the opening of this brief, besides that they involve different tracts of land, consists in this: That there is no pretense that Kales had no actual knowledge of all the facts and that Vina Bryan was a party to the mortgage, and was made a party to the suit to foreclose it in the action of M. W. Kales *vs.* M. W. Kales, administrator of J. M. Bryan, deceased, and Vina Bryan.

Transcript in No. 198, pp. 3 to 10.

It is contended by counsel for appellee that Vina Bryan, or Brown, is estopped by the judgment in that case, and that plaintiff as her grantee is equally estopped. A moment's thought will show the fallacy of this position.

The proof shows that *Vina Bryan did not sign the note*, but simply joined her husband in executing the mortgage given to secure it (Tr., p. 9). The proof also shows that the estate and not Mrs. Bryan owed the debt, and that the mortgaged property belonged to the community estate of J. M. Bryan, deceased, and Vina Bryan; that at the time the mortgage was foreclosed administration was still pending on her husband's, J. M. Bryan's, estate; that Kales was such administrator, and that he was both the plaintiff and a defendant in the suit to foreclose the mortgage. The possession of this very property and the equity of redemption then was in said estate or in Kales as the administrator, and he was under the law an indispensable party to the foreclosure action—

Harwood *vs.* Marye, 8 Cal. 580.
Miles *vs.* Smith, 22 Mo. (1 Jones) 502.
Perkins *vs.* Woods, 27 Mo. 547.
Williams *vs.* Bankhead, 19 Wal. 563.
Porter *vs.* Muller, 65 Cal. 513.
Shields *vs.* Barrow, 17 How. (U. S.) 137.

and neither the heir (Bayly *vs.* Muehe, 65 Cal. 345) nor the wife, though a party to the mortgage, was (Powell *vs.* Ross, 4 Cal. 197). The object of the suit of Kales *vs.* Kales, administrator, and *Vina Bryan*, was to divest the title out of the estate of J. M. Bryan, deceased, and to do this Kales, administrator, was essentially a *necessary and indispensable party* (Pom. Remedies, etc., Sec. 334 et seq., and particularly the notes to Sec. 336). Now, if we have shown that Kales can't sue himself, then the judgment, being void in part, is void in toto. The note and mortgage was not merged in the judgment, and neither Mrs. Bryan nor her grantee, the plaintiff, is estopped. Besides, under no circumstances can it be held that that judgment extends further than simply to estop Mrs. Bryan to deny the execution of the mortgage.

Semple *vs.* Bank Brit. Col., 5 Sawy. 394.
Graham *vs.* Railroad Co., 3 Wall. 704.
Building, etc., Association, *vs.* Chalmers, 75 Cal. 334,

Suppose J. M. Bryan had been living, would a judgment against Mrs. Bryan without joining him have amounted to anything? Here the administrator, Kales, takes the place of J. M. Bryan, deceased.

McLeran *vs.* Benton, 73 Cal. 342.
Cunningham *vs.* Ashley, 45 Cal. 485.

The judgment is *res adjudicata* only as to the issues raised in the pleadings, and no broader.

In Reynolds *vs.* Stockton, 140 U. S. 264, and particularly on pages 269, 270, this court quotes from the 63d Indiana Report. That case was a suit to foreclose a mortgage against the widow and children of the mortgagor, he having died prior to the commencement of the suit. The complaint charged the defendants as heirs, and prayed for foreclosure of such interests. It was not averred that the widow had signed the mortgage. She allowed default on the plead-

ings, charging her as heir. Afterwards she asserted her rights as widow, and was met, as we are here, with a plea of *res adjudicata*. The court overruled the plea, and says:

> "A widow is an heir of her deceased husband only in a special and limited sense, and not in the general sense in which that term is usually used and understood. When the said Anna made default in the action for foreclosure nothing was taken against her as confessed, nor could have been which was not alleged in the complaint, and, as nothing was alleged hostile to her claim as a widow, it follows that nothing concerning her claim as such widow, was concluded against her by the judgment of foreclosure. This proposition we regard as too well founded in principle to need the citation of authorities to sustain it."

Here the complaint in the case of the judgment relied on, charged Mrs. Bryan as co-maker of the mortgage with her husband, and not as surviving widow or heir. Indeed, under the laws of the Territory, she was not permitted to litigate her rights as widow or heir, pending the administration, and until it was closed, because that right—

> "existed exclusively in the administrator, who in all suits for the benefit of the estate, represented both creditors and heirs."
>
> McLeran *vs.* Benton, 78 Cal. 342.
>
> Stockton Building Assn. *vs.* Chambers, 75 Cal. 332.
>
> Colton *vs.* Colton, 127 U. S. 301.
>
> Graham *vs.* Railroad Company, 3 Wall. 704.

The rule is that where a judgment is composed of several elements, one of which is void, the whole is void.

> Swartz *vs.* Hazlett, 8 Cal. 129.
>
> Freeman on Judgments, Sec. 136.

And the reason of the rule is that these several elements

are not severable. The judgment in question is for the recovery of a personal claim against J. M. Bryan's estate, and the foreclosure of the mortgage against Kales, as administrator of said estate, and it is the interest of both the *defendants*, in the mortgaged land—that is, of both the estate and of Vina Bryan—that is ordered to be sold and that was sold in satisfaction of this personal claim against the estate. Now, if that portion adjudicating the debt against the estate and ordering the estate's title to be sold is stricken out, the portion referring to Mrs. Bryan necessarily falls, because she owed no debt, and the title for purposes of administration was in Kales, the administrator. Besides, the claim had never been allowed or approved by the probate judge, and was void.

Comp. Laws Arizona, 1877, Secs. 136, 145, pp. 276–77.
Hearn *vs.* Kennedy, 85 Cal. 56.
Derby & Co. *vs.* Jackman, 89 Cal. 4.

If the estate had had no interest in the land and the object of the suit had been simply to foreclose the mortgage against Mrs. Bryan, without making a personal claim againit the estate, then Kales would not have been a necessary party, and the judgment would be binding on Mrs. Bryan and her grantee, the plaintiff.

Hodgson *vs.* Heidman, 66 Ia. 645.
Schadt *vs.* Heppe, 45 Cal. 433.
Brainer *vs.* Bigelow, 8 Kan. 496.

Mr. Justice Harlan says, in 134 U. S. p. 136, that it is an unusal thing for a man to sue himself; an unusual thing puts one on inquiry. An examination of the certificates of sale and the deeds under which defendant's claim would give notice that M. W. Kales was plaintiff and defendant in the judgment upon which they relied. It did more: it notified defendants that M. W. Kales was the administrator of J. M. Bryan's estate. An examination of the papers in that estate

disclosed that M. W. Kales, the plaintiff, procured letters of administration, because and simply because he was a creditor. If the law requiring a purchaser to exercise prudence and care in the investigation of the title to land, and charges him with notice of everything shown by the record, which leads to a particular fact, and puts a prudent man upon inquiry, means anything, then defendants are wholly at fault and are estopped to visit the results of their carelessness on us. Besides, as we have shown, they bought a mere equity when they bought the sheriff's certificates of sale, and that always implies notice and absolutely destroys all pretense of claim that they are bona fide purchasers.

As the facts in this case have been fully presented in the pleadings and in the findings of the court, and it is unnecessary that a new trial should be had on the facts, we respectfully ask this court to reverse the decision of the lower courts, and to direct said courts to render such judgment in the premises as may be proper.

WM. A. McKENNEY,
WEBSTER STREET,
BEN GOODRICH,
Attorneys for Plaintiff and Appellant.

IN THE

Supreme Court of the [illegible]

OCTOBER TERM, [illegible]

T. J. BRYAN, Plaintiff and Appellant,

vs.

M. W. KALES, Defendant and Appellee. } No. [illegible]

SAME

vs.

GEORGE T. BRASIUS et al., Defendants and Appellees. } No. [illegible]

Appeals from the Supreme Court of the [illegible] of Arizona.

BRIEF FOR APPELLEE

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

T. J. BRYAN, Plaintiff and Appellant,
vs.
M. W. KALES, Defendant and Appellee. } No. 198.

SAME
vs.
GEORGE T. BRASIUS *et. al.*, Defendants and Appellees. } No. 200.

Appeals from the Supreme Court of the Territory of Arizona.

Brief for Appellees.

These cases present the same questions, practically, the difference being in the lands and amounts involved only, and in No. 200 the appellees purchased from J. T. Simms, who bought the land from appellee, Kales, and in addition to all the contentions of appellee in 198 they further urge they are innocent, *bona-fide* purchasers without notice.

The facts in No. 198, as given in the opinion of the Supreme Court of Arizona (Rec., 29), are as follows:

It appears that on the 28th day of August, 1883, one Jonathan M. Bryan died intestate, leaving Vina Bryan his widow and sole heir.

That on the 24th day of September, 1883, one M. W. Kales was appointed administrator of the estate of said deceased, Bryan.

That on the 16th day of October, 1883, in the District Court of Maricopa County, in the suit of M. W. Kales *v.* M. W. Kales, administrator of the estate of Jonathan M. Bryan, deceased, and Vina Bryan, defendant, a judgment and decree foreclosing a mortgage of said premises and ordering a sale of the same was fully entered of record.

The record of this judgment discloses that the mortgage was given to secure a certain promissory note executed by said deceased, Bryan, in favor of M. W. Kales, for the sum of $5,330.82; that said Vina Bryan was the wife of the deceased, Bryan, joined in the execution of the mortgage. The record further discloses that Vina Bryan appeared in case and filed an answer to the complaint, in substance denying any individual indebtedness on her part and disclaiming any right, title, or interest in the premises covered by the mortgage as in any way conflicting with the mortgage set forth in the complaint, and praying to be dismissed from the action. Thereupon judgment was entered in favor of Kales, administrator aforesaid, for the amount due on the note, and a decree entered for the sale of the mortgaged premises.

It further appears that on the 11th day of November, 1883, the premises were sold by the sheriff to satisfy the mortgage, and that at such sale M. W. Kales became the purchaser thereat, paying the full market value of the land at the time and receiving a certificate of sale.

That six months thereafter, there having been no redemption, the sheriff executed a deed to the same in the name of M. W. Kales as the grantee; that thereafter Kales went into possession of the premises and has remained in possession ever since, paying taxes and making valuable and lasting improvements thereon. It further appears that Vina Bryan, the widow and sole heir of said Jonathan M. Bryan, deceased, by quitclaim deed dated 29th June, 1887, conveyed such interest as she then had to appellant, T. J. Bryan, who thereupon commenced an action against Kales, appellee, to recover possession of the premises. (Rec., 1.) Appellee answered fully, setting up the facts above recited for defense. (Rec., 3, 4, 5.) Appellant filed amended complaint (Rec., 3), which was answered also by appellee. (Rec., 6, 7.) Appellant demurred to appellee's answer (Rec., 7, 8), which demurrer was overruled. (Rec., 10.) Appellee filed amended answer (Rec., 9), and the cause coming on to be heard, judgment was entered in favor of appellee (Rec., 10, 11), and appellant moved for a new trial, which was overruled (Rec., 16), whereupon an appeal was taken to the Supreme Court of Arizona, where the judgment of the lower court was affirmed. (Rec., 28.) The case comes here upon appeal, and the assignments of error are thirteen in number. (Rec., 3–8.)

Counsel for appellant, in their brief, cite Bryan *v.* Kales, 134 U. S., 126. There the parties were the same, but the case was not considered except upon demurrer of defendant, Kales, which the lower court had sustained. This court in its opinion said, with reference to the questions hinted at then, which are the main questions here and now, "But as these questions were not considered by the court below, and as their correct determination can be best made when all the facts are disclosed, we express at this time no opinion upon them, and place our decision upon the ground that the Supreme Court of

the Territory erred in holding that the complaint failed to show that the plaintiff was entitled to relief from a court of equity. The defendants should be required to meet the case *upon its merits.*" The case *was* met subsequently upon its merits in this case at ~~law~~, bar and the courts below both found for appellee, Kales. And at the outset we insist, the merits of the case not being in question in Bryan *v.* Kales, 134 U. S., 126 *sup.*, that case can not affect this so as to affect the result here; there was no express opinion, and none was called for in that case, upon the questions here raised now for the *first time.*

As rightly said in appellants' brief, " the defendants—appellees—rely upon the foreclosure judgments in the case of Kales *v.* Kales' administrator," as defense to the action of appellant in Bryan *v.* Kales, and nearly the whole of appellant's brief is devoted to the proposition " that the same person can not be both plaintiff and defendant in the same action," a general rule we do not for a moment deny. But we insist that unless it appeared on the face of the record that Kales, plaintiff, and Kales, defendant, were one and the same person, that fact can not be proved by *evidence introduced in another suit so as to avoid the judgment in the first suit;* in other words, in this case particularly, and as a general rule, the judgment of the court in the foreclosure suit can not be attacked collaterally, by showing want of jurisdiction *aliunde* the record. When this case was being tried appellant introduced evidence to show that in the suit of Kales *v.* Kales, the plaintiff and defendant were one and the same person; and we find this language in appellant's brief: " We further contend that we had a right to introduce evidence *aliunde* the record of the case of Kales *v.* Kales' administrator, to show that he was the identical same person who was both plaintiff and defendant in the actions to foreclose, and that such proof does not contradict the record is settled law;" and counsel cite *three*

cases to support this contention. We deny, most emphatically, the soundness of this argument—it is not founded either upon common-sense law, or the law as settled long ago, by decisions of courts too numerous to mention, these decisions being founded upon a principle in law as old and as unshaken as any principle can well be.

The general rule as laid down by Freeman, is that "when a judgment has been rendered by a court of general jurisdiction, all intendments and presumptions will be indulged in to support that judgment. In the absence of *direct evidence upon the face of such a judgment* showing it to be invalid, it will be treated as a *valid judgment* even though latent causes, not appearing upon its face, exist which would have avoided it."

Freem. Judg. (13 edn.), sec. 116, *et seq.*

In note 1 to sec. 134 of the same work, this question is most ably considered, and the case of Ferguson *v.* Crawford, 70 N. Y., 253, is cited. That case was an action brought to foreclose a mortgage. The defense interposed was that the plaintiff's rights had been barred by a *judgment foreclosing a prior mortgage.* On the trial the judgment roll in the former case was put in evidence. It contained a notice of appearance for plaintiff purporting to be signed by one Mills as attorney. The plaintiff offered to prove that Mills' signature was forged, and that he never did appear for plaintiff. In his ruling upon objections to this testimony the judge, Rapallo, said: "After considerable research I have been unable to find a single authoritative adjudication, in this or any other State, deciding that in the case of a domestic judgment of a court of general jurisdiction, want of jurisdiction *over the person* may be shown by *extrinsic evidence,* while there are a great number of adjudications in neighboring States, holding that in the case of such judgments, par-

ties and privies are estopped in collateral actions 'to deny the jurisdiction of the court over the person as well as the subject matter, *unless it appear on the face of the record that the court had not acquired jurisdiction.*'" The learned judge proceeds then to cite numerous cases supporting him, which will be found in this note (1) to sec. 134, Freeman, *supra.* So we have authority of the highest order upon the *precise* point involved herein, and this is also sustained by other and weighty authority.

Freeman again says (sec. 16), "in either case, the judgment can be avoided, and made *functus officio* by some appropriate proceeding instituted for that purpose; but if not so avoided, must be *respected and enforced.*"

Also, quoting from Coit *v.* Haven, 30 Conn., 199, he says, "the general good clearly requires, and has therefore established, the rule, that domestic judgments of courts of general jurisdiction can not be attacked collaterally." See, also, in the same work, secs. 131–2–3–4 and note, where the whole question is considered, the rule we have stated, and its manifest reason. So, then, we insist, it not appearing upon the face of the record in the foreclosure suit, that Kales, plaintiff, was the same man as Kales, defendant, the conclusiveness of that record could not be attacked collaterally in another suit."

See, also, *Brown Jurisd.*, sec. 4, *et seq.*, and cases cited.

But if our argument be sound, we are still met with the contention that the fact of Kales, plaintiff, and Kales, defendant, being the same person, *did* appear on the face of the record simply because the name was the same. Appellant invokes the rule *idem sonans*, and contends that "identity of name is *prima facie* evidence of identity of person." It is doubtful whether this rule is universal or as well settled as counsel for appellant contends. The rule of law upon this subject is clearly stated by *Lawson* in his late work on *Presumptive Evidence*, page 256, "where

two persons of the same name occupy different positions or relations, the presumption is that they are different persons."

And that author cites in support of the rule, and to illustrate it, Ellsworth *v.* Moore, 5 Iowa, 486; Cozzens *v.* Gillespie, 4 Mo., 82; Wickersham *v.* People, 2 Ill., 128.

But in the foreclosure suit only the family name appeared to be the same; no Christian name was set out in the record. The initials of the Kales who appeared as plaintiff may have represented an entirely different Christian name from that represented by the initials preceding the name of the defendant. Initials constitute no name at all, and it is a rule of evidence, established by authority of judicial decisions which has now become elementary, that "the fact that the family name and initials are the same raises no presumption that the parties are the same."

Lawson, Presumptive Ev., 255;
Louden v. *Walpole*, 1 Ind., 321;
Bennett v. *Libhart*, 27 Mich., 489;
Byford v. *McCue*, 53 Pa. St., 431.

Stevenson vs. Murray et al. 6 So. Rep. 301.

See, also, on this point:

Dorente v. *Sullivan*, 7 Cal., 279;
Cooper v. *Posten*, 85 Amer. Dec., 610;
Jackson v. *Christman*, 4 Wend., 279;
Ellsworth v. *Moore*, 5 Iowa, 486;
Waller v. *Edmonds*, 47 Tex., 469;
Wilson v. *Benedict*, 2 S. W. Rep., 283.

We contend, therefore, that the presumption that plaintiff and defendant were the same person does not apply in this case, and the court did not err in overruling the demurrer in this particular. But if the court should think the fact of M. W. Kales being plaintiff and M. W. Kales defendant was *prima facie* evidence that they were

the same person, still we contend, in the language of Sloan, J., in his opinion in this case in the Supreme Court of Arizona, that "the rule that identity of name is *prima facie* evidence of identity of person, has no application where solemn records of courts of record would thereby be discredited and their integrity impeached." And we earnestly refer the court to a careful study of this whole opinion, where will be found strong cases cited in support of this proposition. (Rec., 28, *et seq.*) And here we contend the Kales judgment had every sign of regularity on its face—every presumption of legality accompanied it. Appellant sought to overthrow that judgment by the lesser presumption that the court would presume, as against the judgment, that plaintiff and defendant were the same person because their names and initials were alike. If this is the law, and it operates to make void the Kales judgment, then not only will the solemn record of a court of record be discredited and its integrity impeached, contrary to the true spirit of the law, but also will the vested, and as yet unremedied and acknowledged, rights of Kales be lost, and ~~but also~~ the innocent purchasers without notice be dispossessed of their legal rights. The law contemplates no such injustice to be done under its equitable espionage; it is asking too much from this court. A mere technicality and a trivial presumption, unaided by any affirmative fact on the record *whatever*, will not be allowed to defeat the ends of justice in this case. We go next to our second contention, and herein we assert two propositions:

1st. Vina Bryan being a party to the Kales foreclosure suit, and having failed there to litigate the question as to Kales being plaintiff and a party defendant, neither she nor her *grantee*, appellant herein, can now attack the judgment upon that ground. Appellant urges that the judgment being void as to Kales, was also void as to Vina

Bryan; we think this is an erroneous view of the matter. It is now too late for Vina Bryan or her grantee, the appellant, to attack the foreclosure proceedings. She was a party to that suit; she had her day in court. If Kales had no right to sue himself, as claimed by appellant, it was Vina Bryan's duty to raise that question then, and not having done so, she is forever estopped from attacking the judgment. Every objection urged by plaintiff against the foreclosure proceedings could have been availed of by Vina Bryan in that suit, but she did not do it then, so neither she nor plaintiff can do it now. She consented to the form of the foreclosure proceedings and to the decree.

Herman on Estoppel, secs. 125–236;
Stockton v. *Ford*, 18 How., 418;
Stout v. *Lye*, 103 U. S., 66.

2d. Even if the judgment was void as to Kales, it was nevertheless valid and binding as to Vina Bryan.

Voorhis v. *Gamble*, 6 Mo. App., 1;
Dickinson v. *Chrisman*, 28 Mo., 134;
St. John v. *Holmes*, 32 Amer. Dec., 603;
School District v. *Chicago Co.*, 21 Pac., 599;
Hollis v. *Dashiel*, 52 Tex., 187;
Black Judg., sec. 211;
Holton v. *Founer*, 81 Mo., 360;
Shallcross v. *Smith*, 81 Pa., 132.

These propositions, sustained by authority so direct, it is sought to weaken their force by maintaining that Vina Bryan was neither a necessary or proper party to that suit, and further that she had no interest in the mortgaged premises, and therefore the judgment was not binding upon her.

Vina Bryan executed the mortgage, and one of the covenants therein is as follows: And *the said parties of the*

first part (J. M. Bryan and Vina Bryan), for themselves, their executors, and administrators, do hereby covenant, promise, and agree *to pay* to the said party of the second part, his executors, administrators, or assignees, the said sum of money and interest as mentioned in said promissory note and secured to be paid as aforesaid."

Here was an express promise upon Vina Bryan's part to pay the principal sum and interest, and in that light alone she was a necessary party.

Appellant claims that Vina Bryan at the time of the execution of the mortgage had no interest in the mortgaged property, and that at the time of the foreclosure of said mortgage she had no interest therein.

Having executed the mortgage she was forever estopped from denying that she had an interest in the mortgaged premises at the date of the mortgage.

The property mortgaged was community property and she did have an interest therein, inchoate, if you please, during the life of her husband, but upon his death it became definitely fixed, actual and existing. Upon the death of J. M. Bryan, Vina Bryan, the wife, became the absolute owner of the property subject to the lien of her husband's debts. In California the statute is similar to the Arizona statute, and in that State it has been held that real estate vests in the heir subject to the lien of the administrator for the payment of debts and expenses of administration.

Beckett v. *Selover*, 7 Cal., 216.

So as a mortgagor and as owner of the property, she was properly made a party to the suit. The fact that a wife executes a mortgage with her husband is a sufficient reason for making her a party defendant in an action to foreclose the same without any allegation as to her interest in the property mortgaged.

Anthony v. *Nye*, 30 Cal., 402.

In an action to foreclose a mortgage all persons beneficially interested in the mortgaged premises at the time of the commencement of the action must be made parties. The widow of a deceased mortgagor is a necessary party.

Burton v. *Lies*, 21 Cal., 88;

See *Story's Equity Pl.*, sec. 193 (edn. of 1844), 1st Dan'ls, 263, *et seq.*

If Vina Bryan was neither a necessary or proper party in the foreclosure suit when she appeared therein, why did she not litigate that proposition? She failed to do it, she submitted herself to the jurisdiction of the court. Neither she nor her grantee can do it now. A suitor can not litigate by piecemeal. If it can be done, then the terms "conclusiveness of judgments" and "their binding efficacy" are meaningless, to be used only to paralyze gaping law students or wondering laymen.

In his opinion in the Supreme Court of Arizona, Sloan, J., says: "I may state, however, that in my opinion, even were the judgment in the case of Kales *v.* Kales void upon its face, and there be no estoppel of record on the part of appellant's grantor, Vina Bryan, then that, in my judgment, all the facts exist which could constitute appellee mortgagee in possession of the premises sued for, and that therefore so long as the mortgage debt remains unpaid, he could not therefore be dispossessed."

And Chief Justice Gooding concurred in that judgment on the ground of appellee being a mortgagee in possession. (Rec., 32.)

The answer of the appellee sets up the facts, and the proof showed that Kales went into possession of the land in controversy by virtue of the aforesaid foreclosure proceedings. He having become the purchaser at the sheriff sale and received the sheriff's deed therefor, and that the mortgage has never been satisfied otherwise than by virtue of these foreclosure proceedings. His position is

that of a mortgagee in possession, and until the mortgage debt has been paid the grantee of one of the mortgagors, this plaintiff can never recover an ejectment.

Appellant's first answer to this proposition is that the mortgage debt is barred by the statute of limitations, and therefore he can recover possession of the premises without being compelled to pay the mortgage debt. Truly, a most equitable doctrine. We can best answer it in the language of the Supreme Court of California, used in Spect *v.* Spect:

"The statute of limitation is a bar to the remedy only and does not *extinguish or even impair* the obligation of the debtor. It is available in judicial proceedings only as a defense, and can never be asserted as a cause of action in his behalf or for conferring upon him a right of action. It is to be used as a shield and not as a sword. It has *never* been held that the expiration of the statutory time for bringing an action to recover a debt or to enforce any personal obligation operated either as an extinguishment or payment. Such a result can not be derived from the language of our statute, the reason or policy of the law, or the decision of the courts in this State or elsewhere."

Spect v. *Spect,* 88 Cal., 444.

Counsel for appellant below very reluctantly admitted that if the mortgagee went into possession of the mortgaged premises with the consent of the mortgagor that he would then be entitled to all the rights of a mortgagee in possession, and ejectment would not lie against him till the mortgage debt had first been paid.

Now the mortgagor may consent that the mortgagee go into possession of the mortgaged premises without saying in so many words that he may do so. The consent may be either expressed or implied. The mortgagor's acts and conduct may be such that consent will be implied therefrom. Vina Bryan's answer in the foreclosure

suit above quoted was a consent that the purchaser at the sale should go into possession of the premises. By that answer she consented to the form of the proceedings. She consented to the decree rendered therein, and she thereby consented to what must inevitably flow from such decree, to wit, the sale of the mortgaged premises and the entry into possession thereof by the purchaser. She consented to the same as though she said in words or writing "I consent to this." She made no objection to the form of the proceedings nor to the decree nor to the sale. She knew of the entry into the premises by the mortgagee, and for years never made objection.

Is this court not bound to say, at least, that from her acts and conduct Vina Bryan gave an implied consent that appellee might enter into possession of the mortgaged premises?

But the rule is broader than as announced by opposing counsel. We maintain that the true and most equitable rule is, that if the mortgagee enters into the possession of the mortgaged premises peaceably he can not be ejected by the mortgagor until the mortgage debt is paid.

Brobst v. *Brock*, 10 Wall., 519;
Johnson v. *Sandhoof*, 14 N. W. Rep., 891;
Moulton v. *Leighton*, 33 Fed. Rep., 143;
Phyfe v. *Rilly*, 15 Wend., 247;
Gibson v. *Lyon*, 115 U. S., 439;
Miner v. *Beekman*, 50 N. Y., 338;
Jones on Mortgages, secs. 702–715;
Henesy v. *Farrell*, 20 Wis., 42.

Even in States where the statute is similar to that in Arizona declaring that a mortgage shall not be deemed to be a conveyance so as to enable the mortgagee to recover possession of the premises without foreclosure and sale, it has been said that where the mortgagee enters into possession peaceably, even though it be by virtue of a *void*

foreclosure sale, he can not be ejected by the mortgagor until the debt is *first paid.*

Cook v. *Cooper,* 22, Pac. Rep., 945, and cases therein cited.

In Cook *v.* Cooper, the Supreme Court of Oregon pointedly says: "This view of the law in no manner interferes with the just rights of the mortgagor, and at the same time it does not sacrifice the interest of the mortgagee to the merest technicalities of the law which has sometimes been permitted to prevail and the mortgagee turned out of possession, stripped both of the property and his mortgage debt as well."

How forcibly does this language apply to the case at bar. The mortgage debt remains unpaid. The grantee of the mortgagor says he will not pay it and that he can not be compelled to pay it because it is barred by the statute of limitation; he nevertheless demands the possession of the mortgaged premises, taking away from the mortgagee his debt and his security, basing his right so to do only upon a technicality of the law, to wit: "Because a man can not sue himself."

Courts look to the substantial rights of the parties for the purpose of determining the remedy to which they are entitled, irrespective of the form of the complaint under which the remedy is sought. Whenever a mortgagor seeks a remedy against the mortgagee, which appears to the court to be ineqitable, whether it be to cancel the mortgage as a cloud upon his title or to enjoin a sale under the power given by him in the security, or to recover from the mortgagee the possession of the mortgaged premises, the court will deny him the relief he seeks, except upon the condition that he should do that which is consonant with equity.

Spect v. *Spect,* 88 Cal., 443.

The appellant says, in effect, "I, or my grantor, in whose shoes I stand, borrowed $5,300 on 160 acres of land worth not much more than that sum. Proceedings by which the mortgage was foreclosed and the mortgagee thereby placed in possession of the land were not contested, and in those proceedings my grantor appeared and disclaimed. I knew those proceedings to be defective, but I remained silent, and asserted no claim, and made no attempt to redeem the premises, and stood by and saw the mortgagee (who thought he had regularly secured a title) make valuable improvements. I waited until the mortgage debt was barred by the statute of limitations, and then I demanded, not the right to pay the debt and redeem the land, but the right to recover the land and pay nothing."

What should be the answer to such a demand, of a court having equitable powers? Will it not say, "He that hath committed iniquity shall not have equity?"

The rule is that he who comes into equity, whether he comes of his own accord or is brought there, must, whenever he demands relief, stand in court with clean hands. If a suitor asking the aid of a court of equity has himself been guilty of conduct in violation of the fundamental conceptions of equity jurisprudence, then the court will refuse him all recognition and relief with respect to the subject-matter or transaction in question. When a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has himself violated conscience or good faith or other equitable principles in his prior conduct, then the doors of the court will be closed against him *in limine;* the court will refuse to interfere in his behalf, to acknowledge his right, or to award him any remedy."

1st Pomeroy, Eq. Jurispr., section 397.

The conditions are not changed because the plaintiff brings his action at law. As already stated, the right is given by the Arizona Code to interpose an equitable defense to an action at law, and so far as the application of the maxims and rules of equity are concerned, the case stands as if it were begun in equity.

It is not alone fraud or illegality which will prevent a suitor from obtaining relief in a court of equity; any really unconscientious conduct connected with the controversy to which he is a party will repel him from the forum whose very foundation is good conscience.

Overton v. *Banister*, 3 Hare, 503;
Lewis' Appeal, 67 Pa. Stat., 166;
Nelson v. *Bird*, 28 N. J. Eq., 352;
Creatt v. *Sims*, 5 How. (U. S.), 192;
Atwood v. *Fisk*, 101 Mass., 363;
Marcy v. *Dunlap*, 5 Lans., 365;
Paine v. *Lake Erie, etc., R. R.*, 31 Ind., 283.

There can be no question that even if Kales, plaintiff, and Kales, defendant, in the foreclosure suit are the same person, and even if the foreclosure proceedings were for that reason void, yet Kales, the mortgagee in the mortgage given by Jonathan M. Bryan in his lifetime, is still a mortgagee in possession; and a mortgagee in possession, whether he gained such possession with the consent of his mortgagee, or by virtue of defective legal process, or by any other means—not fraudulent or tortious—is entitled to remain in possession as against the whole world until he collects his claim.

A mortgage is, in equity, a security for money, while at law it is a conveyance upon conditions. In courts of law the mortgagor is the owner of the land against all the world except the mortgagee, but as against the mortagee he is not the owner until he pays the mortgage. A mortgagee in possession may, if ousted, maintain eject-

ment even against his mortgagor. But a mortgagor can not maintain ejectment to recover possession from his mortgagee unless he first pays or offers payment of the amount of the mortgage and interest.

A mortgagee in possession is, at law, one who has a legal estate after condition broken. Having such estate, being in possession, and the condition having been broken, on what theory should he be turned out? Why put him to the cost and delay of foreclosing his mortgage in order to obtain that which he already has? The neglect of a mortgagee in possession to foreclose is a neglect which inures to the advantage of the mortgagor, for it continues in existence the right of the latter to redeem, it defers the taking of a deficiency judgment, and if continued beyond the statutory period of limitation it will deprive the mortgagee of any right to collect his claim except as against the mortgaged property.

The appellant here appears in brazen and unexplained defiance of the maxim that "he who seeks equity must do equity." It has been well said that "whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interference and aid unless he has acknowledged and conceded, or will admit and provide for all the equitable rights, claims and demands justly belonging to the adversary party, and growing out of or necessarily involved in the subject-matter of the controversy."

The rule that "he who seeks equity must do equity," says, in effect, that the court will give the plaintiff the relief to which he is entitled only upon condition that he has given, or consents to give, the defendant such corresponding rights as *he* also may be entitled to in respect to the subject-matter of the suit.

1st Pomeroy's Eq. Jurispr., sec. 385.

"The court of equity refuses its aid to give to the plaintiff what the law would give him if the courts of common law had jurisdiction to enforce it, without imposing upon him conditions which the court considers he ought to comply with, although the subject of the condition should be one which the court would not otherwise enforce."

Hanson v. *Keating*, 4 Hare, 1, 4.

"An invalid tax deed of the plaintiff's land was set aside as cloud upon his title only upon condition that he refunded all the taxes which had been advanced or paid by the party to whom the deed was given."

Reed v. *Tyler*, 56 Ill., 288.

"If the owner of an estate stands by and suffers another person who is ignorant of his title, or supposes himself to be entitled, to go on and expend money upon the estate, either by erecting buildings or by making other improvements, a court of equity will compel such owner, when he afterwards comes into it to assert his title, to indemnify the one who made the expenditure, either by making a pecuniary compensation, or in some cases, if the expenditures were by a lessee under a defective lease, by confirming and establishing the leasehold interest.

"If the owner should resort to a court of law and bring an action of ejectment, a court of equity, at the suit of the party making the expenditure, would work out the equitable principle by restraining the ejectment until compensation was made."

Powell v. *Thomas*, 6 Hare, 300;
Ramsden v. *Dyson*, L. R., 1 H. L., 129.

"In many cases this right or relief thus secured to, or obtained by, the defendant under the operation of the rule might be recovered by him, if he, as plaintiff—the parties being reversed—had instituted a suit in equity for that purpose. But this is not indispensable, nor is it even always possible. The rule may apply, and under its operation an equitable right may be secured or an equitable relief awarded to the defendant, which could not be obtained by him in any other manner—that is, which a court of equity, in conformity with its settled methods, either would not or even could not have secured or con-

ferred or awarded by its decree in a suit brought for that purpose by him as plaintiff."

1st Pomeroy's Eq. Jurispr., sec. 386.

"If a plaintiff seeks an account against a defendant, the court will require the plaintiff to do equity by submitting himself to account in the same matter in which he asks an account."

Clarke v. *Tipping*, 4 Beaver, 594, 595.

"In the case of a bill for specific performance, the court will give the purchaser his conveyance, provided he will fulfill his part of the contract by paying the purchase money; and *e converso* if the vendor were plaintiff the court will assist him only upon condition of his doing equity by conveying to the purchaser the subject of the contract upon receiving the purchase money.

"So if a bill be filed by the obligor in an usurious bond to be relieved against it, the court in a proper case will cancel the bond, but only upon terms of the obligor refunding to the obligee the money actually advanced. The court will do this so as to remit both parties to their original positions; it will not relieve the obligor from his liability, leaving him in possession of the fruits of the illegal transaction he complains of."

Hanson v. *Keating*, 4 Hare, 1, 4.

"The rule will be applied where the adverse equity grows out of the very transaction before the court, or out of such circumstances as the record shows to be a part of its history, or where it is so connected with the cause in litigation as to be presented in the pleadings and proofs, with full opportunity afforded to the party thus recriminated to explain or refute the charges."

Tripp v. *Cook*, 26 Wend., 143;
McDonald v. *Wilson*, 2 Cow., 139;
Casler v. *Simpson*, 35 N. Y., 523;
Finch v. *Finch*, 10 Ohio St., 501, 507;
N. Y. & N. H. R. R. Co. v. *Schuyler*, 38 Barb., 534, 554;
Shish v. *Foster*, 1 Ves. Sen., 88;
Whitaker v. *Hall*, 1 Glyn & Jam., 213.

"A contract for the purchase of lands was made in 1854, when the price was payable in gold. Subsequently, when the value of the premises had very greatly increased and after the passage of the legal tender act, the purchaser offered to pay the price in the United States legal tender notes, which were then much depreciated, and upon the vendor's refusal brought suit to compel a specific performance. It was held that under these circumstances the plaintiff was not entitled to the relief except upon the condition of paying the price in gold."

Willard v. *Taylor*, 8 Wallace, 557;
Wells v. *Coffin*, 105 Mass., 328;
McGan v. *Shirk*, 54 Ill., 408.

"In States where a court of equity exercises a jurisdiction to set aside or to restrain the collection of illegal assessments or taxes, the relief will not be granted unless the plaintiff pays such portion of the tax or assessment as is lawful and justly due."

Dean v. *Charlton*, 23 Wis., 590;
Morrison v. *Hershere*, 32 Iowa, 271;
Merrill v. *Humphrey*, 24 Mich., 170.

"Where a ward immediately upon coming of age transferred all his property to his guardian for an inadequate consideration, and released the guardian from all liabilities growing out of his trust, and afterwards brought a suit to set aside and cancel such conveyance, and for an accounting, the relief was only granted upon the terms of refunding the amount thus paid by the guardian or giving him credit for such amount in the accounting."

Richardson v. *Tenney*, 7 B. Mon., 574.

"A co-surety asking to be relieved from judgment against him for the whole demand secured can only obtain the relief by paying his own contributory portion of the debt."

Creece v. *Scruggs*, 1 Heisk., 590.

"A widow suing for her dower must account for the use, rents and profits of the land which she has occupied in excess of her third."

McLaughlin v. *McLaughlin*, 5 C. E. Green, 190.

"On the other hand, if the heir sues to set aside his deed to the widow and for an accounting he must allow to her one-third of the income in respect to her dower right."

Ames v. *Ames*, 1 Cinn. Sup. Ct., 559.

"A plaintiff suing in equity for a partition must contribute his proportion of a mortgage on the land which had been paid off by the defendant."

Campbell v. *Campbell*, 21 Mich., 438;
Comstock v. *Johnson*, 46 N. Y., 615;
Phillips v. *Phillips*, 50 Mo., 603;
Kinney v. *C. Va. M. Co.*, 4 Sawy., 383;
Boskonitz v. *Davis*, 12 Nev., 446;
Scammen v. *Kimball*, 5 Biss., 431;
Anderson v. *Little*, 26 N. J. Eq., 144.

In ~~belief~~ brief, the doctrine that "he who seeks equity must do equity," is a universal rule which guides a court in its administration of every kind of relief, and it is to be applied in practice according to the circumstances of the particular case before the court for decision.

There can hardly be imagined a stronger case for the application of this doctrine than the one under review. A mortgagor seeks to recover the mortgaged property from the mortgagee in possession by an action in ejectment, and to evade the payment of the mortgage debt on the ground that its collection is barred by the statute of limitation;—to state the case is to argue it.

Appellant has not done that which is "consonant with equity," that is, to pay the mortgage debt, but on the contrary strenuously maintains that he cannot be compelled to do so; so the lower court very properly said he could not recover. If the court holds appellants can recover the land in controversy, vested rights, undoubted and equitable rights, will be lost—Kales will lose his money, loaned by him in good faith—the others lose their land and money all; to hold a contrary opinion, though, will not cause appellant to lose anything; he paid one

dollar for the land; he has not been put to any expense. Which is the more equitable of the two positions?

In case No. 200 appellant sued Brasius and others who bought from one J. T. Simms, who had in turn bought the certificate from Kales, and to whom, after time for redemption had passed, the sheriff executed his deed conveying to him all the right, title and interest of J. M. Bryan on the 23d of February, 1883, the date of the mortgage, and all interest which he or his estate had subsequently acquired in the land; that he entered into possession and sold the land to the other defendants for its full value, and that valuable improvements have been made upon the land by the defendants, which are still upon the land. (Rec., 37, 38.)

In equity there is no distinction between the different classes of property or of the estates in property which are purchased by innocent parties without notice of adverse claims, with reference to the protection which such innocent purchasers without notice are entitled to receive. A purchaser of property at a sheriff's sale, even personal property, may be a *bona fide* purchaser for a valuable consideration, and as such, he is entitled to be protected against all adverse claims or latent defects of which he has no notice or which he could not have discovered by the inquiry, which the law requires him to make. For example, we cite the case where shares of the capital stock stand in the name of the party on the books of a corporation, whose by-laws provide that no transfer of the shares shall be valid, except between the parties thereto, unless such transfer shall have been entered upon the books of the corporation; and where there has been a sale of the shares and delivery of the usual floating certificates of stock to the purchaser, but no entry made on the corporation books, and such shares are levied upon by the creditors of the seller after he has sold them and received their full value. Now, when the sheriff offers those shares for

sale under execution—if they still appear on the corporation books in the name of the seller—a purchaser may safely buy them at the sheriff's sale, provided he has no notice or knowledge of the shares having been previously sold by the judgment debtor, and if he does so buy and pay for these shares without any notice of the previous sale by the judgment debtor, he will be protected and take the shares discharged of the claim of the previous purchaser; but, on the other hand, if the prior purchaser from the judgment debtor appears at the sheriff's sale and gives notice of his claim, then the purchaser at the sheriff's sale, having *actual* notice of the prior equity of the claimant, would take subject to his rights.

This rule is well illustrated by the following cases:

Weston v. *The Bear River and Auburn Water Co.*, 5 Cal. Reps., 186;

And in the same case on a second appeal reported in the 6th Cal. Reps. p. 186;

See, also, *Naglee* v. *Pac. Whf. Co.*, 20 Cal., 529;

People v. *Elmore*, 35 Cal., 655.

The theory of the cases is this, that the equitable owner of property having permitted the "usual external *indicia* of title" to stand, whereby the ownership appeared to be in another, he will not be permitted afterwards to assert his ownership against one who has purchased the property at a sheriff's sale upon the faith of this *indicia* or record to the disadvantage of another who, upon the faith of that *indicia* or record, had expended his money.

If Vina Bryan, plaintiff's grantor, or the plaintiff, had seen fit to do so, she or he might have had the record in the case of Kales *v.* Kales corrected and thus have prevented these defendants from being misled. But it is quite evident from the whole history of the case that neither one of them desired to do so. Indeed, it is quite apparent that if either of them had substituted any other

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If Vina Bryan, plaintiff's grantor, or the plaintiff, had seen fit to do so, she or he might have had the record in the case of Kales *v.* Kales corrected and thus have prevented these defendants from being misled. But it is quite evident from the whole history of the case that neither one of them desired to do so. Indeed, it is quite apparent that if either of them had substituted any other

party except Kales as the defendant in the foreclosure suit, the result would have been the same. The debt was owing, and it was due. It was necessary to subject this property to the payment of it. It was sold by the sheriff for that purpose, and it brought at the sale its full market value, and the proceeds were properly applied to pay the just debt.

There is no assertion or pretence that these things were done clandestinely or that Vina Bryan or the plaintiff did not at all times know that these proceedings were going on in the administration of the estate, or the foreclosure and sale of the property, nor that any fraud was perpetrated. And it is quite apparent that this suit is an afterthought which grew out of the fact that the value of the premises have largely increased and the plaintiff seeks to recover the property upon a bare legal technicality, but under circumstances whereby it becomes unconscionable to permit them to avail themselves of this naked technicality. In no more fitting way can we close the argument in this case than in the language of Gooding, C. J., in his opinion in the Supreme Court of Arizona, in No. 200:

"Of course, if the title still remained in Vina Bryan or Vina Brown, she could convey it to her grantee. If the case stopped here I would think the decree below should be reversed, but the facts of the case disclose an indebtedness of twenty-five hundred dollars to Kales from T. J. Bryan and a mortgage to secure the same on the property in dispute—a proceeding in court in good faith and without fraud on the part of Kales or any one to foreclose the mortgage (the proceeding thought to be valid and regular on its face), a sale under the decree of the court and possession taken in pursuance thereof, and taxes paid and valuable and lasting improvements made by the purchaser and his grantee.

"The plaintiff brings suit by action of ejectment. He does not pay or offer to pay the mortgage debt. In this Territory the action of ejectment is based upon the right

of possession. I think, on the very best authority and the highest equity, the defendant must be held to be the mortgagee in possession and subrogated to the rights of Kales under his mortgage and entitled to remain in possession till the requirements of equity are fully met. On this proposition it is only necessary to refer to the following authorities: 22 Pac. Rep., 945; 10 Johnson, N. Y., 479; 30 Am. Dec., 58; 14 Wend., 233.

"But it is claimed by appellant that the debt secured by the mortgage was barred by the statute of limitations at the commencement of this action and therefore need not be paid. I do not think a court of equity would ever allow the statute to have that effect. It would be so inequitable and shocking to all sense of right that a court exercising equitable powers, as this court does, and recognizing equitable defenses in an action of ejectment would never disturb the possession of a mortgagee in peaceable and quiet enjoyment under legal proceedings, valid or invalid, until the mortgage debt was paid and all other requirements of equity fully met. If the decision in this case rested soly on this last proposition the case should perhaps be remanded for an accounting, etc.

"But, as a majority of this court think the judgment of the court below should be affirmed on the other grounds as well, the judgment of the court below will simply be affirmed."

And we insist, respectfully, the judgment of the Supreme Court of Arizona should be affirmed.

A. C. BAKER,
A. H. GARLAND, and
R. C. GARLAND,
Attorneys for Appellees.

IN THE

UNITED STATES SUPREME

OCTOBER TERM,

T. J. BRYAN,
Plaintiff and Appellant,

vs.

D. H. PINNEY, et al.,
Defendants and Appellees.

No. [illegible]
Appeal from
Supreme Court
of [illegible]

BRIEF FOR APPE

D. H. PINNEY

Attorney for Appe

DONN
PRINTER

IN THE

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1895.

T. J. BRYAN, Plaintiff and Appellant, vs. D. H. PINNEY, et al., Defendants and Appellees.	No. 199. Appealed from the Supreme Court of Arizona.

BRIEF FOR APPELLEES.

The appellant commenced an action against the appellees alleging that he was on the 29th day of June, 1887, the owner in fee of block Number ninety-eight, and that on July 1st, 1887, the appellees entered into possession of said lands and premises and withholds possession from appellant. What part of this block is held by either of the appellees is not shown by the complaint. By the answer the interest of the dif-

ferent defendants is fully set forth. Lots one, three, seven and nine were on the 18th day of November, 1886, sold and conveyed to Story, and on the 6th day of December, 1886, a part of the same lots were sold and conveyed to appellee Sherman; that on the 11th day of September, 1886, lot ten, in said block, was sold and conveyed to appellee, The Bank of Napa. The claims of the several answers are fully sustained by the proofs in the case. (Record, pp. 28-29.) Three distinct causes of action are thus united on this appeal, with one bond and one valuation (Record, pp. 41-43), which leaves this Court without jurisdiction on appeal.

Friend vs. Wise, 111 U. S., 797.

The facts in this case are in many respects different from the facts in Numbers 198 and 200. On the general facts, however, of the appointment of M. W. Kales, administrator of the estate of J. M. Bryan, deceased, and of the foreclosure, the causes are substantially the same.

At the October Term, 1883, of the District Court of Maricopa County, M. W. Kales, by his solicitors, commenced an action to foreclose a mortgage on property known as block ninety-eight in the City of Phoenix. M. W. Kales, administrator of the estate of J. M. Bryan, deceased, was made the defendant in said action, and by his attorney appeared; and the counsel so appearing agreed upon a decree in the case. (Record, p. 29.)

The facts of the sale under the decree, the subsequent purchase by Pinney, and most of the facts in

the case, are set forth in the opinion of the Supreme Court of the territory. (Record, p. 36.)

That prior to the expiration of the time for redemption Vena Bryan executed papers to appellant for the purpose of allowing said appellant to redeem from said sale, and (on the 20th day of July, 1884) appellant commenced action against L. H. Orme, the sheriff, Kales and appellee Pinney, and offered to redeem block ninety-eight. (Record, pp. 17, 22 and 29.)

Offering to redeem from a foreclosure sale is entirely inconsistent with the subsequent claim of appellant herein, and by such offer to redeem the party thereby affirmed and ratified such sale.

Herman on Est., p. 1199.
Mills vs. Ayers, 59 Iowa, 424.

To the same effect is:

Davis vs. Wakelee, 156 U. S., 680.

Ratification or election once made, expressly or impliedly, for a moment, is irrevocable, and binds not only the party, but all claiming under him.

Herman on Estoppel, p. 1196.
Pence vs. Langley, 99 U. S., 598.

And this is so even if the judgment is void.

Freeman on Void Sales, 48 and 50.
Kirk vs. Hamilton, 102 U. S., 68.

On a sale of property by the executor without authority, where the heirs encourage the sale, the heirs are not only estopped, but the purchaser can main-

tain an action to compel them to execute a conveyance.

Havill vs. Roberts, 50 N. Y., 222.

The owner of the right of redemption reported publicly that she did not wish to redeem and was glad to hear that Pinney was going to purchase.

And if a party proclaims publicly that he abandoned claim to the land and advises others to purchase, and the owner of the right of redemption encourages a person to purchase by a promise that he will not redeem, a court of equity will not allow him to violate his engagements and redeem from such purchaser who has made extensive improvements on the land.

Furgerson vs. Tallmadge, 20 Ill., 599.
Jones on Mortgages, Vol. 2, 1049.

Block ninety-eight sold at the administrator's sale for its full value. (Record, p. 30.) Both Mrs. Bryan and the appellant knew of the sale. Appellant went there at the time for the express purpose of bidding at the sale (Record, p. 23).

If the fact that Kales had commenced proceedings to foreclose and sell this property was so objectionable to the widow or the appellant, they might have applied to the court for such relief as the law entitled them to. This could be done either by motion in the suit itself or by the filing of a separate action. Such application may be made by any one injured by the proceedings under the decree, although not a party to the suit.

Jones on Mortgages, Sec. 1668.
Freeman on Judg., Sec. 92.

If nothing prevents an application in the original suit, an original bill for this purpose cannot be sustained.

Brown vs. Foret, 10 Paige, 243.
Ketchum vs. Crippen, 37 Cal., 2226.
Gould vs. Mortimer, 26 How., N. Y., 167.

If the proceedings are regular and free from fraud and the party is only equitably entitled to relief, his only remedy is by motion in the foreclosure suit.

Jones on Mortg., Sec. 1668, and cases there cited.

Again, we claim that if the parties have been injured by the action of the administrator, the courts are and have been open to them to obtain any relief they are entitled to; but not at the expense of third persons who purchased at that sale in good faith, and without notice of equities existing between the administrator and cestui que trust. The sale made under a valid judgment entitles the purchaser to the property, and his rights therein cannot be disturbed, nor can the title to the property be affected in any way by any pretended wrong which the administrator may have done his ward. If the judgment of Kales vs. Kales was, as between the parties in interest, merely a voidable judgment—and nothing more can be successfully claimed for it—the injured party might recover for the injury if he could show he has suffered injury thereby; but in no event could the sale

made to third persons be interfered with. The Supreme Court of Illinois on this subject, in Fergus vs. Woodworth, 44 Ill., 374, say:

> "In no event can the sale as to third parties be interfered with, unless actual notice is proven to exist at and before the time the purchase money was paid, and not even then if the sale has been approved, ratified or acquiesced in. Judgments and sales thereunder may be voidable, or even void, between the parties for the failure to comply with some statute or law, and the judgment may be reversed on appeal or error, and still the title of the innocent purchaser will not be interfered with. In other words, the injured party might recover the amount the land sold for from the plaintiff, while the purchaser would retain his title to the land.
>
> "Purchasers at foreclosure sales are not noticed with anything that requires proof. The rule of lis pendens does not apply to a purchaser under a decree of foreclosure who is not a party to the record. The law does not require the purchaser to inspect the record and see that it is free from errors. He only has to see that the court had jurisdiction and that there is such a judgment or decree."

THE PLEADINGS AND THE RECORD.

Counsel for appellant, in their brief, say that the answer shows on its face that Kales, the plaintiff, and Kales, the administrator in the foreclosure suit, is the same person. The answer simply alleges that M. W. Kales, the mortgagee, commenced an action to foreclose, wherein he was plaintiff and M. W. Kales, the administrator of the estate of J. M. Bryan, deceased, was defendant. (Record, p. 8.)

Nothing alleged in the answer, and nothing shown in the foreclosure proceedings, established the fact that the plaintiff and the defendant were one and the same person. In the statement of facts it is stated that it was proven on the trial that Kales, the plaintiff, and Kales, the administrator, are the same person. (Record, p. 29.) How this came into the Record the writer does not know. The bill of exceptions, also the motion for new trial, shows that the court held against the admission of such testimony. (Record, pp. 20-23.)

From the above statement counsel for appellant contend that, even if the judgment of Kales vs. Kales is not void upon its face, the fact being stated in the defendant's pleadings and proven on the trial that Kales, the plaintiff, and Kales, the administrator, are the same person, that this settles the question, and cite the case of Hill vs. City Cab Co., 79 Cal., 188, in support of their theory.

The defendant in that case answered that he was

not served with process and never appeared and never authorized any one to appear for him. The judgment in that case affected the parties to the suit alone. Such a rule has no application here. For Kales to come into this case and admit that he was both plaintiff and defendant in the foreclosure suit, or to prove it on the trial, could not affect the title of the appellees herein, who are innocent purchasers—what we had notice of on the record in foreclosure suit we are bound by, but nothing beyond that.

VOID AND VOIDABLE JUDGMENTS.

It is safe to say that no well considered case can be found where it is held that a judgment can be attacked collaterally and is void simply because the plaintiff and the defendant happen to be of the same name.

Let us look at some of the leading cases cited by counsel for appellant on the subject of void judgments.

In Page vs. Patten, 5 Pet., 312, there is no question of the validity of a judgment. In that case the question was whether an administrator could retain from the assets in his hands sufficient to pay his own claims, and the Court, on page 314, say:

> "The executor cannot sue himself, and for this reason he is authorized to retain the amount of his debt out of the estate in his hands."

Paschell vs. Haidman, 4 Gil., 300, the question of

a void judgment does not arise. It was an appeal from the Probate Court construing different sections of the laws of Illinois in the distribution of the assets of deceased persons.

The Record shows that Morrison had obtained his judgment against Edgar in 1826. Edgar died in 1830. Four years after Morrison had obtained his judgment, and four years before Morrison was appointed administrator, and in passing upon the priority of liens, etc., the Court took occasion to say:

> "That an administrator could not, without absurdity, commence a suit against himself as representative of the deceased."

Brown vs. Mann, 71 Cal., 192, is another case where the question of judgment was not before the court at all. In that case Charles Brown was appointed administrator of the estate of Mann. Brown held a mortgage against Mann and assigned it over to Adolph Brown for the sole purpose of having him commence a suit of foreclosure against the administrator. This was done and a decree obtained. Brown afterwards went into court and asked to have the decree set aside. This was done. Brown resigned as administrator, and one Otto was appointed. Otto was brought in on a supplemental complaint as defendant. The attorneys for the estate plead the Statute of Limitations, and the Court held the plea good. And although the decree had been set aside, still, in writing the opinion, the Court took occasion to say that the decree of Brown vs. Brown was a nullity.

Denny vs. Metcalf, 28 Me., 389, is a case where the

record shows that John Metcalf and S. Weatherby were partners and plaintiffs, and the same John Metcalf, with Cashman and Lee, were defendants, and these facts are all set up in the defendant's answer in the case, and the Court say:

> "The same persons cannot, at the same time, be plaintiff and defendant where a contract is attempted to be enforced."

Bailey & Harris vs. Harris, 8 N. H., 233, is another case where the pleadings in the case show that Harris, plaintiff, and Harris, defendant, was the same person.

Buchanan vs. Meisser, 105 Ill., 643, was tried upon an admitted state of facts, the People's Bank of Belleville being one of the parties to the suit. Harrison & Co. was a partnership firm, and the two Harrisons were the stockholders in the bank and had a double liability. And the Court held a partnership firm, as a creditor of a corporation, cannot maintain an action at law against one of such firm to enforce his undivided liability as a stockholder of the creditors of the corporation, since he cannot be both plaintiff and defendant.

Livingston, executor, vs. Livingston, 12 Am. Dec., 684, is a case in which the plaintiff obtained a judgment against himself as executor. The Court say: "The plaintiff obtained a judgment, and a motion is now made to set it aside, and to arrest the judgment on several grounds." This case is all right. It is just what Mrs. Bryan might have done in this case, gone into the District Court after the decree of fore-

closure was made, and moved to set aside the judgment. Nay, more than that; she not only might have done it, but it was her duty to do it, and to do it in apt time, too, or be forever barred. But the evidence shows that she did not want to do it. She was perfectly satisfied with the judgment. And so was her successor in interest perfectly satisfied with the judgment. So well satisfied was he with it, that he offered to redeem from the sale, made under a decree, which he swears he knew all about at the time of the sheriff's sale; and she approved of his action in this regard, for she gave him a conveyance on purpose to make the redemption with. No, they did not want to disturb that judgment, there was nothing in it then; but years afterwards, when the property became valuable, and a chance for speculation was seen, and the Statute of Limitations had expired, then it was for the first time claimed that that judgment was a horrible thing.

IS IDENTITY OF NAME IDENTITY OF PERSON?

Under this head counsel cites a number of cases to the effect that identity of name is prima facie evidence of identity of person. Jackson vs. King, 5 Cowen, 239, is a fair sample of the cases cited. In that case the Court say: "That the fact that the plaintiff being of the same name of the patentee or grantee was not required to go further than to produce his patent or deed, unless the presumption of identity was first repelled by the defendant."

Brown vs. Metz, 33 Ill., it is held that James Brown, to whom Felag conveyed, will be presumed to be the same person that executed the conveyance to Libbie.

The 18 Mo., 274, is another case where it is held that in tracing title, identity of name is presumed to be identity of person.

Campbell vs. Wallace, 46 Mich., 320, was a suit upon a certified copy of a judgment, and the Court held that it was not necessary to prove that the defendant named in the certificate and the defendant sued were one and the same person; that sameness of name was prima facie evidence of sameness of person.

Thompson vs. Warner, 1 Cal., 428, was a suit upon a foreign judgment, with the same ruling as in 46 Mich.

We have no disposition to question the rulings in the above cases. The same reason which might be advanced to sustain the ruling in a suit on a judgment, viz., that the plaintiff would sue the right party, and the same presumption that a party would not convey a piece of property that he did not own, might well be invoked in favor of the proposition that a man would not sue himself.

But identity of name in adverse interests is not identity of person, and especially is this so in actions at law where the record is silent on the subject, as in the case of Kales vs. Kales. And this Court has already advised counsel on this subject in Bryan vs. Kales, 134 U. S., 135. Wherein the Court, in effect, say that if the full record in the foreclosure case of Kales vs. Kales, administrator, discloses the fact, as

in McElhanon vs. McElhanon, 63 Ill., 457, that plaintiff and defendant was one and the same person, the suit could not be sustained.

Perkins vs. Seispan, 11 R. I., 276, cited by this Court, holds that if an individual bring suit against himself as administrator, and a new administrator is afterwards appointed, he may come into court by plea in abatement, and the plea would be sustained.

By the case of Hoag vs. Hoag, 55 N. H., 172, we are advised that if a party does commence a suit against himself that such a process is not void, but voidable only.

In that case Hoag commenced suit against himself as administrator. The principal defendant appeared and moved to dismiss the action. The Court say: "The case at bar is precisely like the case of Blaisdell and Page vs. Ladd & Page, Tr., 14 N. H., 129, except here the motion to dismiss is made by the principal defendant, and there it is made by a subsequent attaching creditor, a distinction without a difference. Belknap vs. Gibbons, 3 Met., 473, cited and approved. The case conclusively finds that the plaintiff and the defendant are the same person; if it were traversable, the identity should be pleaded in abatement. Belknap vs. Gibbons, before cited. But the identity being conceded, the trustee may be discharged upon motion. But we cannot regard the process as absolutely void; it is voidable only, at the suggestion and by the pleading in abatement of the principal defendant or some interested party.

Belknap vs. Gibbons and a trustee, cited and approved in Hoag vs. Hoag, is a very strong case. The

statement of the case shows that the person summoned as trustee was defaulted.

The principal defendant appeared and moved that the action should be dismissed, whereupon the Court of Common Pleas ruled that the said action could not be maintained as against the trustee by reason of his being plaintiff in said action, and ordered the action dismissed. Shaw, Ch. J., says: "The Court are all of the opinion that the action ought not to have been dismissed. No sufficient ground appears on the face of the writ and return. On the contrary, all appears regular, the service on a trustee and the trustee defaulted. It does not appear, and cannot appear without evidence aliunde the record, that John A. Carpenter, one of the plaintiffs, and John A. Carpenter, the trustee, are one and the same person; nor can such evidence be given without a plea in abatement, or in bar."

In Cogswell vs. Armstrong, 77 Ill., 139, judgment was introduced in evidence wherein Murphy & Company were defendants, and Walsh, Brooks & Company, plaintiff, and James Walsh, it appeared, was a member of both firms, and the Court say: "The judgment may not be regular, and, perhaps, had a defense been interposed before the justice a judgment might have been defeated, but, as appears from the evidence, the justice of the peace had jurisdiction of the subject matter and of the person, and although the judgment may be irregular, yet the irregularities cannot be inquired into collaterally by appellant, who is a stranger to the judgment."

In Prescott vs. Tuffs, 7 Mass., the Court held: "That

it will not be presumed that James Prescott, the plaintiff in the suit, and James Prescott, the chief justice who tried the case, were one and the same person. If this were a fact it should have been pleaded in abatement." To the same effect is the decision in Ellsworth vs. Moore, 5 Iowa, 486.

In Wilson vs. Benedict, 90 Mo., 213, the Court say: "The rule that from identity of name identity of person may be presumed has no application in this case, and cannot be extended so far as to uphold as an inference that when a plaintiff sues a defendant having the same name of plaintiff, that both persons are one and the same."

In California it is held that the court will not presume that the guardian ad litem, E. W. Smith, and E. W. Smith, the justice before whom the affidavit was made, are one and the same person.

Dorente vs. Sullivan, 7 Cal., 279.

In 1 Duval, Ky., 92, Mary Cooper made a promissory note to herself, and judgment was entered thereon. The record went up to the Court of Appeals without any evidence in the record to show that she was one and the same person, and the Court said that they could not presume it, and refused to disturb the judgment.

The general principle is that a judgment can be considered void in no case except where it appears from the judgment itself.

Allen vs. Huntington, 16 Am. Dec., 702.

If the court had jurisdiction the judgment is merely

voidable, and it will be conclusive in collateral actions as though rightly found.

Bigelow on Estoppel, 50.
Freeman on Judgments, Secs. 116 and 132.
Mills vs. Alexander, 21 Texas, 163.

In Benefield vs. Albert, 132 Ill., 676, the Supreme Court say: "When a decree is called in question collaterally, as in this case here, it may be regarded as a general rule that in all courts of general jurisdiction nothing is presumed to be out of their jurisdiction but what specially appears to be so; but, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court but that which is expressly alleged."

Even where a bill is filed to set aside a sale, the proceedings are as purely collateral as to purchasers at the sale, whose title is sought to be divested, as in action of ejectment.

Moore et al. vs. Neil, 39 Ill., 257.

A court will look well to the consequences of its acts, and the case must indeed be a strong one which will induce it to nullify a judgment, and thus put it in the power of a debtor to plead the Statute of Limitations to a debt which he does not deny to be justly due.

Gregory vs. Ford, 14 Cal., 143.

THE JUDGMENT IS MERELY VOIDABLE.

Such a judgment is a voidable one, nothing more. It is held to be an erroneous judgment, and all the authorities are to the effect that an erroneous judgment cannot be attacked collaterally.

Freeman on Judgments, 4th Ed., Sec. 337.
Jones on Mortgages, Sec. 1587.
Chapman vs. Brewer, 114 U. S., 158.
Torrents vs. Hicks, 32 Mich., 307.
Ogden vs. Walters, 12 Kans., 282.

In the latter case the Supreme Court of Kansas say: "But we do not think that the judgment can ever be attacked in a collateral proceeding simply because the affidavit for publication may have been untrue. It would be against public policy and the peace and good order of society that such a thing should be done. Land that was comparatively worthless in 1862, when this affidavit was made, may be immensely valuable now."

MORTGAGEE IN POSSESSION.

The undisputed evidence is that the appellee, Pinney, purchased the certificate of sale and went into possession under the sheriff's deed, and was in possession at the time of the commencement of this suit. The record also shows that the premises sold at sheriff's sale for their full value (Record, p. 30), and that

the money derived from the sale was fully accounted for to the estate, and still the claim is made by appellant that he is not even bound to pay the mortgage debt.

Appellee Pinney became the assignee of the mortgage debt. His possession was complete, and ejectment in such case cannot be sustained.

Newell on Ejectment, p. 48.
Wood vs. Wood, 66 Maine, 206.
Minor vs. Peckman, 50 N. Y., 337.
Brobst vs. Brock, 10 Wall., 519.

EQUITABLE DEFENSE.

This defense we had a right to make under the practice.

Kirk vs. Hamilton, 102 U. S., 68.

The grantor of appellant lived across the street from block 98 at the time of the sale, and for a long time afterwards, and while appellee, Pinney, was erecting the improvements thereon, she said she did not wish to redeem and was glad to hear that Pinney was going to buy the block. (Record, p. 29.)

The rule in such cases is well stated by Chancellor Kent in Wendell vs. Van Renselaer, 1 John. Ch., N. Y., 344: "There is no principle better established nor one founded on more solid consideration of equity and public utility than that which declares that a man who knowingly—though he does it passively, looks on and suffers another to purchase and expend money

on land under an erroneous opinion of title—without making known his claim, shall not be permitted to exercise his legal right against such person. It would be an act of fraud and injustice, and his conscience is bound by his equitable estoppel. * * * The improvements going on under the purchase were made in full view of the very residence of the defendant."

And this ruling is approved by this Court in

Kirk vs. Hamilton, 102 U. S., 76.

See, also:

Harman on Estoppel, pp. 1194, 1195, 1199.
Dickerson vs. Calgrove, 100 U. S., 580.

NOTICE.

Counsel contend that when appellees became purchasers that then they became interested, and should have examined the record, etc. It is true that the purchasers in such cases are bound by whatever the record discloses, but they are not chargeable with notice of anything which requires proof to establish.

Forgus vs. Woodworth, 44 Ill., 374.

The general doctrine of notice must be something more than mere want of caution as distinguished from willful blindness; there the doctrine of constructive notice will not apply, and the purchaser will be considered, as he is in fact, a bona fide purchaser without notice.

Jones on Mortgages, Vol. 1, 592.

Purchasers under a decree of court will not be affected by any fraud unless it is apparent on the face of the decree.

Kerr on Fraud, 317.

They cannot be expected to look beyond the face of the paper as it appears on the records, nor can they be charged with anything beyond.

Gatewood vs. House, 65 Mo., 663.
North vs. Belding, 13 Conn., 376.
Hart vs. Colker, 14 Conn., 77.

In Battenhouser vs. Bullock, 11 Brad. (Ill.), 665, a very full collection of the authorities on the subject of notice is made. In that case a mortgage described a certain note, without specifying any amount; the Court say that, "Such a mortgage is not good, as against subsequent purchasers," citing in the opinion—

Lalley vs. Holland, 1 Swan., Tenn., 396.
Taylor vs. Harrison, 47 Texas, 454.
McLouth vs. Hurt, 51 Texas, 115.
Baldwin vs. Marshall, 2 Hump., Tenn., 116.
Adams vs. Demis, 29 Louisiana, 315.
Nelson vs. Wade, 21 Iowa, 49.
Gale, executor, vs. Morris, 29 N. J. Eq., 266.
Disque vs. Wright, 49 Iowa, 540.
Miller vs. Ware, 31 Iowa, 524.

And the Court adds: "It follows from the foregoing authorities that the constructive notice to Battenhouser of complainant's rights rising from the record of the deed of trust was no more extensive than the

facts stated in the record itself. The rule that what is sufficient to put a purchaser upon inquiry is notice of whatever that inquiry would have disclosed, has no application; that rule applies to actual, not constructive, notice. If Battenhouser had examined the record he would have failed to obtain notice of any indebtedness of six thousand, or any other sum. The record, then, was constructive notice of no rights in the complainant."

This case is affirmed in Bullock vs. Battenhouser, 108 Ill., 28.

Respectfully submitted,

D. H. PINNEY,

Attorney for Appellees.

162-420

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920

No. 532

ARTHUR D. ANDREWS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

FILED FEBRUARY 28, 1921.

(15,800)